TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 144.

JESSE HOYT SMITH, APPELLANT,

vs.

WILLIAM J. RAINEY, LILLIAN RAINEY, HIS WIFE, FRANK LUKE, AND JOHN LUKE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED OCTOBER 29, 1906.

(20,439.)

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a In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Appellant,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Appellees.

Transcript on Appeal.

1 In the District Court of the Third Judicial District of the Territory of Arizona in and for the county of Maricopa.

JESSE HOYT SMITH, Plaintiff,
against
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; and FRANK LUKE, Defendants.

Comes now the above named plaintiff, and for cause of action respectfully shows to this court:

1st. That -he said plaintiff and the defendants William J. Rainey and Lillian Rainey his wife are each and all non-residents of the Territory of Arizona. That the defendant Frank Luke resides in the City of Phœnix, County of Maricopa and Territory of Arizona.

2nd. That on or about the 20th day of March, 1897, the plaintiff and the defendant William J. Rainey became the owners in fee simple of the following described property; the plaintiff being the purchaser of a two-thirds interest and the defendant William J. Rainey being the purchaser of the remaining one third interest in the said property to-wit:

Section 22, Township 2 North, Range 3 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona; except the Northwest one quarter (N. W. ¼) of the Northwest one
2 quarter (N. W. ¼) of said section.

3rd. That the purchase price for said property, was the sum of Eighteen thousand (18000) Dollars, all of which said sum was advanced and paid by this plaintiff.

4th. That on the same day to-wit on said 20th day of March, 1897, this plaintiff and the said defendant William J. Rainey duly entered into a written contract wherein and whereby it was among other things agreed, that this plaintiff and said defendant having joined in the purchase price of said property for the purpose of platting, grading and otherwise improving said property and as so improved to sell and dispose of the same, that this plaintiff should advance all the money necessary for the improvement of the said property as contemplated by said agreement, and that this plaintiff should be repaid for all such moneys so advanced by him either in the purchase of the said property or in advances made for the improvement of said property, as rapidly as possible from the receipts from the sale

or sales or other income of said property until the same shall be fully paid with interest at six per cent per annum. And it was therein further agreed that all moneys so advanced by this plaintiff as aforesaid, shall be considered as loans made by him, and that if after five years from the date of said agreement, all the money or any portion thereof so advanced shall not have been repaid to this plaintiff, with interest as hereinabove set forth, then that said defendant William J. Rainey agrees to pay on demand thereafter to said plaintiff herein, one-third (⅓) of all such loans then unpaid, including interest thereon as aforesaid.

5th. That this plaintiff has since said 20th day of March, 1897, advanced for the purchase of the above described property and for the improvement thereof, various sums of money from time to time, aggregating in all with interest thereon at 6% per annum, to the sum of Sixty-five thousand three hundred and sixteen and 51/100 (65,316.51) Dollars, and that no part of said sum has been repaid to this plaintiff, although demand has been heretofore made upon the said defendant William J. Rainey for the repayment of one third of said amount so advanced, as in said above mentioned agreement provided, but that said defendant refused and still refuses to pay the aforesaid one third of the sum so advanced by this plaintiff.

6th. That this plaintiff has done and performed each, every and all the agreements and stipulations set forth in the said agreement above referred to, on his part to be performed, but that said defendant has for some time past and still neglects to do and perform any of the covenants and agreements in said agreement mentioned, and refuses to further carry out said agreement.

7th. That the defendants Lillian Rainey and Frank Luke each claim to have some lien or interest in, on and upon the interest of the said defendant William J. Rainey in said property hereinabove described, which liens if any there be, are each and all subject and subordinate to the lien of this plaintiff.

Wherefore this plaintiff prays the judgment of this court:

1st. That he be declared to have an equitable mortgage lien in and upon the interest of the said William J. Rainey in the property hereinabove described, to the amount of $21772.17, said sum being one third of the amount advanced by this plaintiff as hereinbefore set forth, with interest thereon figured up to the 23rd day of May, 1903, and that such mortgage lien shall in addition extend to all interest accruing up to the time of payment thereof and to the costs and disbursements incurred herein.

2nd. That this plaintiff be declared to have a mortgage lien upon the interest of said William J. Rainey in the property hereinbefore described, which lien is prior and superior to that of the defendants herein (said Lillian Rainey and said Frank Luke) if any they have.

3rd. That this plaintiff have judgment of this court against the said defendant for the full amount so found due him together with the costs and disbursements incurred by him herein.

4th. That the defendants Lillian Rainey and Frank Luke and William J. Rainey be foreclosed of all right, title, interest, and equity

in and to the said interest of the said William J. Rainey in and to the property above described, and that said interest of the said William J. Rainey in the property above described be decreed by this court to be sold as under execution, and out of the proceeds of such
5 sale this plaintiff be paid the amount found due him, together with interest and the costs and disbursements incurred herein.

5th. That this plaintiff have such other and further judgment and relief as may seem meet and equitable, in the premises.

C. F. AINSWORTH,
Plaintiff's Attorney.

(Endorsed:) 4129. In the District Court, Third Judicial District, Territory of Arizona, County of Maricopa. Jesse Hoyt Smith against William J. Rainey, & o'rs. Complaint. C. F. Ainsworth, Pl'ffs' Att'y. Filed July 18, 1903, at 11:35 o'clock A. M. Elias F. Dunlevy, Clerk. By J. E. Sturges, Deputy.

6 In the District Court of the Third Judicial District of the Territory of Arizona in and for Maricopa County.

JESSE HOYT SMITH, Plaintiff,
against
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Defendants.

Comes now the above plaintiff by this his second amended complaint herein, complains of the defendants and alleges:—

1st. That said plaintiff and the said defendants William J. Rainey and Lillian Rainey his wife are each and all non-residents of the Territory of Arizona. That said defendants Frank Luke and John Luke reside in the City of Phœnix, County of Maricopa and Territory of Arizona.

2nd. That said defendant Lillian Rainey was at all the times hereinafter mentioned and now is the wife of the said defendant William J. Rainey.

3rd. That on or about the 20th day of March, 1897, the said plaintiff and the said defendant William J. Rainey, entered into a written agreement for the joint purchase, management, control and sale of certain real property, described as Section numbered twenty-two (22), in Township numbered Two (2) North of
7 Range numbered three (3) East of the Gila and Salt River Base and Meridian, in the County of Maricopa, in the Territory of Arizona, except the northwest quarter of the northwest quarter of said section; which said agreement was executed and delivered by the said plaintiff and the said defendant William J. Rainey, a copy of which is hereunto annexed Marked "Exhibit A," and made a part hereof, to the same extent as if herein set forth:

4th. That pursuant to the terms of said agreement this plaintiff advanced all the purchase price of said property hereinabove described, to-wit $18,000. and in addition thereto, advanced for the

improvement thereof, pursuant to said agreement, various sums of money aggregating in all, with interest thereon, at the rate of six per cent. per annum, figured up to the 23rd day of May, 1903, to the sum of Sixty-five thousand three hundred and sixteen and 51/100 ($65,316.51) Dollars, and that since said 23rd day of May, 1903, said plaintiff has so advanced the additional sum of One thousand and eighty-five ($1085) Dollars, no part of which said several sums has ever been repaid to this plaintiff.

5th. That all of the money so advanced as aforesaid by the plaintiff herein, was used in the purchase and improvement of the property hereinbefore described, including the undivided one third interest therein of the defendant William J. Rainey, and was so advanced under and pursuant to the terms and stipulations in said agreement hereunto annexed, contained.

8 6th. That this plaintiff has done each and every of the agreements and stipulations set forth in said agreement, on his part to be performed, but that said William J. Rainey, defendant, has for some time past neglected and refused and still neglects and refuses to do or perform any of the covenants and agreements in said agreement mentioned.

7th. That none of the property above described -as ever been sold or disposed of, and no part of the money so advanced as aforesaid by the plaintiff herein, has ever been repaid to this plaintiff, and all of said sums of money so advanced, are still due to this plaintiff.

8th. That the defendants Lillian Rainey, Frank Luke and John Luke each claim to have some lien or interest, in, on or upon the interest of the defendant William J. Rainey in the property hereinabove described, which liens if any there be, are each and all subject and subordinate to the lien of this plaintiff.

Wherefore this plaintiff prays the judgment of this court:

1st. That this plaintiff be declared to have an equitable mortgage lien in and upon the interest of the said William J. Rainey in the property hereinbefore described, to the extent of one-third of the several sums so advanced by the plaintiff herein for the purchase and improvement of the said property herein described, together with interest thereon, to-wit:—for the sum of $21,772.17 with interest thereon from the 23rd day of May, 1903, and $361.66

9 with interest thereon, at the rate of six per cent. per annum.

2nd. That said mortgage lien or equitable lien be declared to be prior and superior to any liens claimed by the defendants herein, if any they have.

3rd. That this plaintiff have the judgment of this court foreclosing said equitable lien upon the interest of the said defendant William J. Rainey in the property herein described, for the full amount of said lien; that the defendant William J. Rainey, Lillian Rainey, Frank Luke and John Luke be foreclosed of all right, title, interest and equity in and to the said interest of the said William J. Rainey in and to the property herein described, and that said interest of the said William J. Rainey in the property herein described, be decreed by this court to be sold as under execution, and out of the

proceeds of such sale this plaintiff be paid the amount found due him, together with the costs and disbursements incurred herein.

4th. That this plaintiff have such other and further relief and judgment as to this court may seem just and equitable.

C. F. AINSWORTH,
Plaintiff's Attorney.

10 EXHIBIT A.

Memorandum of Agreement.

This Memorandum of Agreement, Made this 20th day of March, 1897, by and between Jesse Hoyt Smith, of Milwaukee, Wisconsin, and William J. Rainey, of Cleveland, Ohio, parties hereto, Witnesseth: that whereas the said parties have this day purchased a certain tract of land known as section 22 Township 2, North, Range 3 East of G. and S. R. Meridian, Maricopa County, Arizona, except the N.W. ¼ of the N.W. ¼ of said Section, for the sum of Eighteen Thousand Dollars ($18000) in cash, said tract of land having been purchased by the said parties in the proportion of an undivided two-thirds (⅔) interest to the said Jesse Hoyt Smith and an undivided one-third (⅓) interest to the said William J. Rainey according to a deed now on record in the office of the County Recorder of Maricopa County, Arizona, in Book 43 of Deeds, pages 565-6-7;

And whereas the said tract of land was so conveyed free and clear of all liens and incumbrances, and the full consideration for the whole thereof, being Eighteen Thousand Dollars ($18000) was paid in cash by said Jesse Hoyt Smith, and said William J. Rainey has agreed to repay to said Jesse Hoyt Smith the one-third (⅓) thereof with interest thereon at six per cent. per annum as hereinafter provided;

And Whereas said parties have joined in said purchase for the purpose of platting, grading and otherwise improving said
11 property, and as so improved selling and disposing of the same at a profit.

Now, Therefore, the parties hereto do, and each for himself doth, agree with the other in the manner following:

First. That the improvement of said tract of land shall be commenced not later than the 1st day of January, 1898, and such improvements be thereafter continued with reasonable diligence and dispatch until the same shall be in marketable condition as lots.

Second. That the improvements aforesaid shall consist of the surveying and platting the entire tract into lots, the opening up and grading of all the streets; the planting of suitable shade, ornamental and fruit trees, and the making of all such other improvements as may be hereafter agreed upon between the parties hereto.

Third. That said Jesse Hoyt Smith, in addition to the sum of Eighteen Thousand Dollars ($18000) so advanced by him as aforesaid, shall also from time to time make all necessary advances of money for the improvements aforesaid, and also all such as shall be required for the running and incidental expenses of the under-

taking, including taxes, irrigation charges, marketing said lots and the reasonable and necessary expenses of said William J. Rainey from Cleveland, Ohio, to Phœnix, Arizona, and return, and his living expenses when in Arizona while engaged in business relating to said property.

12 Fourth. That all money advanced by said Jesse Hoyt Smith in said purchase, as well as all such as shall be hereafter advanced by him for any of the purposes aforesaid, shall be considered and treated as a loan or loans by him, and shall be paid to him as rapidly as possible from the receipts from the sale or sales or other income of said property until the same shall be fully paid with interest at six per cent. per annum and before any division of profits shall be made or paid.

Fifth. That if at the date of five (5) years from the date hereof, all the loans aforesaid shall not have been fully paid to said Jesse Hoyt Smith, with interest as above provided, then and in that event said William J. Rainey hereby agrees that he will on demand thereafter pay to said Jesse Hoyt Smith the one-third (⅓) of all such loans then unpaid, including interest thereon as aforesaid.

Sixth. That said William J. Rainey shall have general management of said tract of land including the improvements thereof as aforesaid, and the employment of all labor and making of all contracts necessary therefor, and also including the handling and sale of said lots when so improved; provided, however, that no contracts or other obligation on account of said property exceeding in the aggregate the sum of Five Thousand Dollars ($5000.00) shall be entered into without the previous written consent of said Jesse Hoyt Smith, and no contract for the sale of any such lots shall be made except at prices and on terms to be agreed upon between the

13 parties hereto; provided always that said William J. Rainey shall at all times and from time to time give to said Jesse Hoyt Smith true accounts of all transactions relating to the business, and full information in regard to all matters which shall come to his hands or knowledge respecting such business, and shall give due regard to his wishes and directions respecting the same.

Seventh. That said William J. Rainey shall keep full, true, correct and proper books of account of all the transactions and dealings relating to said business, which shall at all times be open to the inspection of said Jesse Hoyt Smith; and that he will on the 10th day of each month render to said Jesse Hoyt Smith an account in full of all transactions during the preceding month including all contracts made and all disbursements and receipts, and showing all the assets and liabilities of the partnership.

Eighth. That said William J. Rainey hereby agrees to accept the said general management of said tract of land, without other consideration or remuneration excepting only his one-third (⅓) share in the net profits of such business as is hereinafter provided.

Ninth. That after the re-payment to said Jesse Hoyt Smith of the said sum of Eighteen Thousand Dollars ($18000) so advanced by him for the purchase of said tract and the repayment of all advances which shall be hereafter made by him on account of said

property or said business, together with interest on all such
14 sums at six (6) per cent. per annum, the net profits of said land and said business shall be divided between the parties hereto as follows: said Jesse Hoyt Smith shall be entitled to the two-thirds (⅔) thereof, and said William J. Rainey the one-third (⅓) thereof; and the losses if any, shall be shared between the parties in ratio aforesaid.

It is further agreed and understood between the parties hereto that this Memorandum of Agreement is made for the purpose of stating explicitly the terms of co-partnership on which the said Jesse Hoyt Smith and William J. Rainey have joined in the purchase, improvement and sale of said tract or lots and that each will fulfill in good faith and to the best of his ability the articles herein contained. Which convenants and agreements shall extend to and bind the respective parties and their respective legal representatives.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

J. HOYT SMITH. [SEAL.]
WM. J. RAINEY. [SEAL.]

In Presence of
J. W. DADMUN.
Z. M. CHANDLER.

(Endorsed:) 4129. District Court, Third Judicial District of the Territory of Arizona, County of Maricopa. Jesse Hoyt Smith, *against* William J. Rainey, *et als.* 2nd Amended Complaint. C. F. Ainsworth, Plaintiff's Attorney. Service of the within by copy admitted this 31st day of Dec. 1903. Walter Bennett of counsel for John Luke & Frank Luke. Filed Dec. 31, 1903. Elias F. Dunlevy, Clerk. By J. E. Sturges, Dep. Copy Rec'd this 31 day of Dec. 1903, L. H. Chalmers.

15 In the District Court of the Third Judicial District, Territory of Arizona, in and for Maricopa County.

JESSE HOYT SMITH, Plaintiff,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Defendants.

Action Brought in the District Court of the Third Judicial District of the Territory of Arizona, in and for Maricopa County, and the Complaint Filed in said Maricopa County, in the Office of the Clerk of said District Court.

In the Name of the Territory of Arizona to William J. Rainey and Lillian Rainey, his wife, Frank Luke and John Luke, Defendants, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above named plaintiff in the District

Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, and answer the amended complaint therein filed with the Clerk of this said Court, at Phœnix, in said County, within twenty days after the service upon you of this summons, if served in this said County, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and the seal of the District Court of the Third Judicial District of the Territory of Arizona, in and for
16 Maricopa County, this 23d day of Sept. A. D., 1903.

[SEAL.] ELIAS F. DUNLEVY,
Clerk of said District Court.

OFFICE OF THE SHERIFF, *County of Maricopa, ss:*

I hereby certify that I received the within Summons on the 23rd day of Sept. A. D., 1903, at the hour — 3:45 P. M., and personally served the same on the 23rd day of September A. D., 1903 on John Luke, he being the one of the defendants named in said Summons, by delivering to said John Luke personally in the County of Maricopa, Arizona a copy of said Summons, to which was attached a true copy of the Amended Complaint mentioned in said Summons.

Dated this 23rd day of Sept. A. D. 1903.

W. W. COOK, *Sheriff,*
By JAMES M. GRAY,
Deputy Sheriff.

Fees.

Service	$1.50
Copies	.60
Travel 1 miles	.30
Publication	—
Total	$2.40

(Endorsed:) No. 4129. District Court. Third Judicial District. County of Maricopa, Territory of Arizona. Jesse Joyt Smith, Plaintiff, *vs.* Wm. J. Rainey, *et al.*, Defendants. Summons. Filed Sept. 23, 1903. Elias F. Dunlevy, Clerk. C. F. Ainsworth, Attorney for Plaintiff. Received. Date Sept. 23rd, 1903, at 3:45 P. M.

17 In the District Court of the Third Judicial District, Territory of Arizona, in and for Maricopa County.

JESSE HOYT SMITH, Plaintiff,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; and FRANK LUKE, Defendant.

Action Brought in the District Court of the Third Judicial District of the Territory of Arizona, in and for Maricopa County, and the Complaint Filed in said Maricopa County, in the Office of the Clerk of said District Court.

In the Name of the Territory of Arizona to William J. Rainey and Lillian Rainey, his wife, and Frank Luke, Defendant, Greeting:

You are hereby summon-d and required to appear in an action brought against you by the above-named plaintiff in the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, and answer the complaint therein filed with the Clerk of this said Court, at Phœnix, in said County, within twenty days after the service upon you of this summons, if served in this said County, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and the seal of the District Court of the Third Judicial District of the Territory of Arizona, in and for Maricopa County, this 4th day of August, A. D. 1903.

18 [SEAL.]

ELIAS F. DUNLEVY,
Clerk of said District Court,
By J. E. STURGES,
Deputy Clerk.

OFFICE OF THE SHERIFF, *County of Maricopa, ss:*

I hereby certify that I received the within Summons on the 4th day of August A. D., 1903, at the hour — 12:20 P. M., and personally served the same on the 4th day of August A. D., 1903, on Frank Luke, he being one of the defendants named in said Summons, by delivering to said Frank Luke personally in the County of Maricopa, Arizona, a copy of said Summons, to which was attached a true copy of the Complaint mentioned in said Summons. Dated this 4th day of August, A. D., 1903.

W. W. COOK, *Sheriff,*
By JAMES M. GRAY,
Deputy Sheriff.

Fees.

Service	$1.50
Copies	.60
Travel 1 miles	.30
Publication	—
Total	$2.40

(Endorsed:) No. 4129. District Court, Third Judicial District, County of Maricopa, Territory of Arizona. Jesse Hoyt Smith, Plaintiff *vs.* William J. Rainey and Lillian Rainey and Frank Luke, Defendant-. Summons. Filed Aug. 4, 1903. Elias F. Dunlevy, Clerk. By J. E. Sturges, Deputy Clerk. C. F. Ainsworth, Attorney for Plaintiff. Rec. 12:20 P. M., 8/4-1903.

19 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JESSE HOYT SMITH, Plaintiff,

vs.

WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; and FRANK LUKE, Defendants.

Comes now the defendant, Frank Luke, and answering plaintiff's complaint for himself alone:

I.

Demurs to plaintiff's complaint and shows to the court that said complaint does not state facts sufficient to constitute any cause of action against, or any relief whatever as against this defendant.

II.

Demurring specially to said complaint this defendant shows that it appears upon the face of said complaint that there is a defect of parties defendant in this, that this defendant is not a proper party defendant in this action.

And should the above demurrer be overruled, this defendant answering plaintiff's complaint:

20 I.

Admits the allegations of paragraph 2nd of plaintiff's complaint.

II.

This defendant further answering plaintiff's complaint, shows to the court that he has no knowledge or information regarding the matters and things alleged and set forth in paragraphs 3rd, 4th, 5th and 6th of plaintiff's complaint, and, therefore denies the same.

III.

This defendant further answering admits that he claims to have an interest in and lien upon the premises described in plaintiff's complaint, and denies that the said lien upon and interest in said premises are subject and subordinate to any lien upon or interest in said premises held by plaintiff.

IV.

This defendant further answering plaintiff's complaint alleges: That on to-wit, June 11th, 1902, the defendant W. J. Rainey was the owner of and held in his own name the title of record to, and

was in the possession of an undivided one-third interest in and to Section 22, township 2 N. Range 3 E. of Gila & Salt River Base and Meridian, Maricopa County, Arizona; except the N.W. ¼ of the N.W. ¼ of said section. That on the day last aforesaid, the said defendant, W. J. Rainey being indebted to Frank Luke (this defendant) and John Luke, in the sum of $2500.00 with
21 interest thereon at 6 per cent. from April 1st, 1902, the said Frank Luke and John Luke commenced an action in this court against the said defendant W. J. Rainey to recover the said sum and interest as aforesaid. That in said action, the plaintiffs therein sued out of this court a writ of attachment for the said sum of $2500, and interest as aforesaid against the goods, chattels, real estate and property of the said W. J. Rainey to secure the said sum of $2500 and interest as aforesaid, and caused the same to be delivered to the sheriff of Maricopa county for service. That on to-wit the 11th day of June, 1902, the said sheriff of Maricopa county by virtue of the said writ of attachment, duly seized, and levied the said writ of attachment upon, and attached, all the right, title and interest of the said W. J. Rainey in and to the premises above described, and on the day last aforesaid filed a copy of the said writ of attachment, together with a description of the property attached, with the county recorder of said Maricopa county, and the same was on the day last aforesaid duly filed by him and recorded in said recorder's office in a book kept by him for that purpose. That thereafter such proceedings were had in said cause that on to-wit June 11th, 1903, the said Frank Luke and John Luke recovered a judgment against the said W. J. Rainey for the sum of $2500, with interest thereon at the rate of 6 per cent. per annum from April 1st, 1902, together with the costs of said action, and which judgment foreclosed the lien of said attachment upon the premises herein before described as the same existed on June 11th,
22 1902, and ordered and directed that the said premises be sold as under execution to satisfy said judgment. That the said judgment still remains of record in this court and is wholly unpaid, unsatisfied and undischarged.

Wherefore This defendant prays that plaintiff take nothing by this action as against this defendant.

That it may be adjudged and decreed that the lien of the attachment and judgment foreclosing the same, herein set forth is a prior and superior lien upon the undivided one-third interest of said W. J. Rainey in the premises described in plaintiff's complaint, to any claim to or interest in said undivided one-third interest which the plaintiff may have by reason of any of the matters and things alleged in his complaint.

That this defendant have judgment for his costs and disbursements herein.

That this defendant may have such other and further relief as equity may require.

A. C. BAKER,
WALTER BENNETT,
Attorneys for D'f't Frank Luke.

(Endorsed:) No. 4129. Third Jud. Dist. Arizona, Maricopa County. Jesse Hoyt Smith, Plaintiff, *vs.* William J. Rainey and Lillian Rainey his wife and Frank Luke, Defendants. Demurrer and Answer of Defendant Frank Luke. Filed Aug. 14, 1903. Elias F. Dunlevy, Clerk. By J. E. Sturges, Dep.

23 In the District Court of the Third Judicial District of the Territory of Arizona in and for Maricopa County.

JESSE HOYT SMITH, Plaintiff,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Defendants.

Comes now the defendants William J. Rainey and Lillian Rainey by their attorneys Chalmers and Wilkinson, answering the complaint on file herein, respectfully shows to the court:

1st. Said defendants deny each and every allegation in said complaint contained, and of this they put themselves upon the country.

Wherefore having fully answered, the defendants pray that they be dismissed hence with their costs and disbursements herein expended.

CHALMERS & WILKINSON,
Att'ys for Defendants Named.

(Endorsed:) 4129. Dist. Court 3rd Judicial Dist. Territory of Arizona, County of Maricopa. Jesse Hoyt Smith *vs.* Wm. J. Rainey, *et als.* Answer. Filed Oct. 7, 1903, at 10:40 A. M. Elias F. Dunlevy, Clerk. Service of copy acknowledged this 7th day of Oct., 1903.

24 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JESSE HOYT SMITH, Plaintiff,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Defendants.

Answer to Amended Complaint.

Come now the defendant- Frank Luke and John Luke, and answering plaintiff's amended complaint for themselves alone:

I.

Demur to plaintiff's amended complaint and show to the court that said complaint does not state facts sufficient to constitute any cause of action against said defendants or either of them, or for any relief whatever as against said defendants or either of them.

II.

Demurring specially to said amended complaint, these defendants show that it appears upon the face of said complaint that there is a defect of parties defendant in this, that these defendants are not proper parties defendant in this action.

And should the above demurrer be overruled, these defendants, answering plaintiff's amended complaint:

25 I.

Show to the court that they have no knowledge or information regarding the matters and things alleged and set forth in paragraphs 2, 3, 4, 5, 6, and 7 on plaintiff's said amended complaint and therefore deny same.

II.

These defendants further answering admit that they claim to have an interest in and lien upon the premises described in plaintiff's said complaint, and deny that the lien upon and interest in said premises are subject and subordinate to any lien upon or interest in said premises held by plaintiff.

III.

These defendants further answering plaintiff's said complaint, allege: That on to-wit, June 11, 1902, the defendant, J. W. Rainey, was the owner of and held in his own name the title of record to, and was in the possession of an undivided one-third interest in and to Section 22, township 2 N. Range 3 East of Gila & Salt River Base and Meridian, Maricopa county, Arizona; except the N. W. one-quarter of the N. W. one-quarter of said section.

That on the day last aforesaid, the said defendant, W. J. Rainey being indebted to Frank Luke and John Luke, these defendants, in the sum of $2500.00 with interest thereon at 6 per cent. from April 1, 1902, the said Frank Luke and John Luke commenced an action in this court against the said defendant W. J. Rainey to recover the said sum and interest as aforesaid. That in said action, the

26 plaintiffs therein sued out of this court a writ of attachment for the said sum of $2500, and interest as aforesaid against the goods, chattels, real estate and property of the said W. J. Rainey to secure the said sum of $2500 and interest as aforesaid, and caused the same to be delivered to the sheriff of Maricopa county for service. That on to-wit, the 11th day of June, 1902, the said sheriff of Maricopa county, by virtue of the said writ of attachment, duly seized and levied the said writ of attachment upon, and attached all the right, title and interest of the said J. W. Rainey in and to the premises above described, and on the day last aforesaid filed a copy of the said writ of attachment, together with a description of the property attached, with the county recorder of said Maricopa County, and the same was on the day last aforesaid duly filed by him and recorded in said recorder's office in a book kept by him for that purpose.

That thereafter such proceedings were had in said cause that on

to-wit, June 11, 1903, the said Frank Luke and John Luke recovered a judgment from the said W. J. Rainey for the sum of $2500 with interest thereon at the rate of 6 per cent. per annum from April 1, 1902, together with the costs of said action, and which judgment foreclosed the lien of said attachment upon the premises hereinbefore described as the same existed on June 11, 1902, and ordered and directed that the said premises be sold as under execution to satisfy said judgment. That at the time of the commencement of this
27 action judgment still remained of record in this court, wholly unpaid, unsatisfied and undischarged.

That since the commencement of this action and since the filing of the defendant Frank Luke's answer to the plaintiff's original complaint, to-wit, on the — day of August, 1903, an order of sale was duly issued out of this court in the cause hereinbefore mentioned, directed to the Sheriff of Maricopa County, Arizona, commending him to seize and sell as under execution the premises and property hereinbefore mentioned, to satisfy said judgment, and that by virtue of said order of sale, the said sheriff did seize the said premises and property, and, pursuant to a notice duly published and posted as required by law, did, on the — day of September, 1903, sell the said premises and property at public auction at the front door of the courthouse in Phœnix, Maricopa County, Arizona, to the highest and best bidder, and that the defendants, Frank Luke and John Luke, were the purchasers at said sale, and that thereupon the said sheriff executed and delivered to said defendants, Frank Luke and John Luke, the usual certificate of purchase of said premises, and that the said Frank Luke and John Luke are now the owners and holders thereof.

Wherefore: These defendants pray that plaintiff take nothing by this action as against these defendants.

That it may be adjudged and decreed that the lien of the attachment and judgment foreclosing the same herein set forth was a prior and superior lien upon the undivided one-third interest of
28 said W. J. Rainey in the premises described in plaintiff's said complaint, to any claim to or interest in said undivided one-third interest which the plaintiff may have by reason of any of the matters and things alleged in his complaint.

And that by said sheriff's sale of said premises, the defendants, John Luke and Frank Luke, acquired the title to an undivided one-third interest in the premises aforesaid, as against the plaintiff herein and those claiming by, through or under him, subject only to the right of the defendant, Wm. J. Rainey, to redeem the said premises from said Sheriff's sale within six months from the date of said sale, as provided by law.

That these defendants have judgment for their costs and disbursements herein; that these defendants may have such other and further relief as equity may require.

WALTER BENNETT,
A. C. BAKER,
Att'ys for Defendants Frank Luke and John Luke.

(Endorsed:) 4129. In Dist. Court Maricopa Co. Arizona. Jesse Hoyt Smith *vs.* William J. Rainey, *et al.* Answer of Frank Luke & John Luke to Amended Complaint. Filed Octo. 13, 1903. Elias F. Dunlevy, Clerk. By J. E. Sturges, Dep. Recd. copy of within Answer this 12th day of Oct. 1903, C. F. Ainsworth, pr. T. D. B. Atty. for Plff.

29 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JESSE HOYT SMITH, Plaintiff,
vs.
W. J. RAINEY, LILLIAN RAINEY, FRANK LUKE, & JOHN LUKE, Defendant-.

Statement of Costs.

To the Clerk of said Court and C. F. Ainsworth, Attorney for Plaintiff:

In compliance with Section 1557, Revised Statutes of Arizona, 1901, you and each of you are hereby notified that Frank Luke & John Luke claim as costs in the above entitled cause, the sum of $6.50 for the following expenses and disbursements incurred by them, viz:

Clerk's fees	$6.50
Sheriff's fees	
Jury Fees	
Witness fees	
Total	$6.50

WALTER BENNETT,
Attorney for Frank Luke & John Luke.

(Endorsed:) No. 4129. In the District Court, Third Judicial District, Territory of Arizona, County of Maricopa. Jesse Hoyt Smith Plaintiff, *vs.* W. J. Rainey and Lillian Rainey, Frank Luke & John Luke, Defendant-. Statement of Costs. Filed Jany. 13, 1904. Elias F. Dunlevy, Clerk.

30 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JESSE HOYT SMITH, Plaintiff,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Defendants.

This cause coming on to be heard upon the demurrer of the defendants, Frank Luke and John Luke, to the second amended com-

plaint of the plaintiff herein, and the court having heard the arguments of counsel for plaintiff and defendants, Frank Luke and John Luke, and being fully advised in the premises,

It is ordered, adjudged and decreed that the said demurrer be and the same is hereby sustained.

And the plaintiff having elected to stand by his said complaint, it is further ordered, adjudged and decreed that the plaintiff's complaint herein be dismissed as to the defendants Frank Luke & John Luke and that the defendants Frank Luke and John Luke have judgment against the plaintiff for their costs and disbursements herein, taxed at $6.50.

Done at Phœnix, Jany. 9, 1904.

EDWARD KENT, *Judge.*

31 (Endorsed:) 4129. In Dist. Court Third Dist. of Arizona, in and for the County of Maricopa. Jesse Hoyt Smith *v.* William Rainey, *et al.* Decree. Docketed. Filed Janu. 16, 1904, at 2 o'clock P. M. Elias F. Dunlevy, Clerk. By J. E. Sturges, Deputy. Recorded Book "H" page 85.

32 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JESSE HOYT SMITH, Plaintiff,
against
WILLIAM J. RAINEY, LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Defendants.

The Plaintiff in the above entitled action having heretofore given due notice of appeal from the judgment of this court to the Supreme Court of the Territory of Arizona, and having made application to the undersigned to fix the amount of the bond required on such appeal, as provided by law,

Now therefore, the amount of said bond on appeal herein is fixed at the sum of $200.00, that being a sum at least double the probable amount of the costs of the suit of both the appellate court and the court below.

ELIAS F. DUNLEVY,
Clerk of the District Court, 3rd Judicial District, Territory of Arizona.

(Endorsed:) 4129. In the District Court, Third Judicial District, Territory of Arizona, County of Maricopa. Jesse Hoyt Smith *v.* William J. Rainey, *et als.* Order fixing amount of appeal bond. C. F. Ainsworth, Atty. for Plff. Filed Apl. 18, 1904, Elias F. Dunlevy, Clerk. By J. E. Sturges.

33 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

Be it remembered That heretofore and on to-wit the 12th day of September, A. D., 1903, the same being one of the regular juridical days of the April Term, A. D., 1903, of said Court, the following order, *inter alia,* was had and entered of record in said Court, which said order is in words and figures as follows, to-wit:—

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY ET AL.

At this day it is ordered by the Court that the demurrer of defendant Luke to the complaint herein, be continued for hearing until September 19th instant.

And afterwards and upon to-wit the 19th day of September, A. D. 1903, the same being one of the regular juridical days of the April Term, A. D. 1903, of said Court, the following order, *inter alia,* was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY ET AL.

34 At this day it is ordered by the Court that the demurrer of defendant Luke to the complaint herein be reset for hearing September 26th instant.

And afterwards and upon to-wit the 26th day of September, A. D., 1903, the same being one of the regular juridical days of the April Term, A. D., 1903, of said Court the following order, *inter alia,* was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE H. SMITH
vs.
W. J. RAINEY ET AL.

At this day it is ordered by the Court that the demurrer of F. Luke to the complaint herein be reset for hearing October 3rd proximo.

And afterwards and upon to-wit the 3rd day of October, A. D. 1903, the same being one of the regular juridical days of the April Term, A. D., 1903, of said Court the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE H. SMITH
vs.
W. J. RAINEY ET AL.

35 At this day it is ordered by the Court that the demurrer to the complaint herein be reset for hearing October 10th instant.

And afterwards and upon to-wit the 10th day of October, A. D. 1903, the same being one of the regular juridical days of the October Term, A. D., 1903, of said Court the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE H. SMITH
vs.
W. J. RAINEY ET AL.

At this day it is ordered by the Court that the demurrer of defendant Luke to the complaint herein be reset for hearing October 17th instant.

And afterwards and upon to-wit the 17th day of October, A. D. 1903, the same being one of the regular juridical days of the October Term, A. D., 1903, of said Court the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE H. SMITH
vs.
W. J. RAINEY ET AL.

36 At this day it is ordered by the Court that the demurrer of defendants Luke to the complaint herein be reset for hearing October 24th instant.

And afterwards and upon to-wit the 24th day of October, A. D. 1903, the same being one of the regular juridical days of the October Term, A. D. 1903 of said Court the following order, *inter alia*,

was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE H. SMITH
vs.
W. J. RAINEY ET AL.

At this day it is ordered by the Court that the demurrer of defendants Luke to the complaint herein be reset for hearing November 7th, proximo.

And afterwards and upon to-wit the 7th day of November, A. D. 1903, the same being one of the regular juridical days of the October Term, A. D., 1903, of said Court the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY ET AL.

37 At this day, by consent, it is ordered by the Court that the demurrer of defendants Luke to the complaint herein be reset for hearing November 14th instant.

And afterwards and upon to-wit the 14th day of November, A. D., 1903, the same being one of the regular juridical days of the October Term, A. D., 1903, of said Court the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE H. SMITH
vs.
W. J. RAINEY ET AL.

At this day come the parties hereto by their attorneys respectively, And thereupon this matter coming on to be heard upon the demurrer of defendants Luke to the amended complaint herein is argued by counsel and by consent is submitted to the Court for its further consideration.

And afterwards and upon to-wit the 28th day of November, A. D. 1903, the same being one of the regular juridical days of the October Term, A. D., 1903 of said Court the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

38

4129.

JESSE H. SMITH
vs.
W. J. RAINEY ET AL.

This matter having been heretofore submitted to the Court upon the demurrer of defendants Luke to the amended complaint herein and by the Court taken under advisement and the Court being now fully advised in the premises doth sustain said demurrer.

And afterwards and upon to-wit the 22nd day of December, A. D. 1903, the same being one of the regular juridical days of the October Term, A. D. 1903, of said Court the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE H. SMITH
vs.
W. J. RAINEY ET AL.

At this day on motion of plaintiff it is ordered by the Court that he have ten days from this date in which to file his amended complaint herein.

And afterwards and upon to-wit the 2nd day of January, A. D. 1904, the same being one of the regular juridical days of the October Term, A. D., 1903, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said
39 cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE H. SMITH
vs.
W. J. RAINEY ET AL.

At this day it is ordered by the Court that this matter be continued for hearing upon the demurrer to the 2d amended complaint herein until January 9th instant.

And afterwards and upon to-wit the 9th day of January, A. D. 1904, the same being one of the regular juridical days of the October Term, A. D., 1903 of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE H. SMITH
vs.
FRANK LUKE ET AL.

At this day come the parties hereto by their attorneys respectively, And thereupon this matter coming on to be heard upon the demurrer of defendants Luke to the 2d amended complaint herein is argued by counsel and the Court being now fully advised in the premises doth sustain said demurrer, whereupon plaintiff electing to stand upon said complaint, it is ordered by the Court that defendants Frank & John Luke have judgment against plaintiff for
40 their costs incurred and expended herein by reason of said action.

And afterwards and upon to-wit the 16th day of January, A. D. 1904, the same being one of the regular juridical days of the October Term, A. D., 1903, of said Court, the following Judgment was filed and entered of record in said Court in said cause, which said judgment with the endorsements thereon is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JESSE HOYT SMITH, Plaintiff,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Defendants.

This cause coming on to be heard upon the demurrer of the defendants, Frank Luke and John Luke, to the second amended complaint of the plaintiff herein, and the Court having heard the arguments of counsel for plaintiff and defendants, Frank Luke and John Luke, and being fully advised in the premises,

It is ordered, adjudged and decreed that the said demurrer be and the same is hereby sustained.

And the plaintiff having elected to stand by his said com-
41 plaint, it is further ordered, adjudged and decreed that the plaintiff's complaint herein be dismissed as to the defendants Frank Luke & John Luke and that the defendants Frank Luke and John Luke have judgment against the plaintiff for their costs and disbursements herein, taxed at $6.50.

Done at Phœnix, Jan'y 9, 1904.

EDWARD KENT, *Judge.*

Endorsed: 4129. In Dist. Court third Dist. of Arizona, in and for the County of Maricopa Jesse Hoyt Smith, *vs.* William J. Rainey, *et al.* Decree Docketed. Filed Jan'y 16, 1904, at 2 o'clock P. M. Elias F. Dunlevy, Clerk. By J. E. Sturges, Deputy. Recorded Book "H" Page 85.

And afterwards and upon to-wit the 2nd day of April, A. D. 1904, the same being one of the regular juridical days of the October Term, A. D., 1903, of said Court, the following Order, *inter alia,* was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY ET AL.

At this day comes the said plaintiff by C. F. Ainsworth Esq., his attorney and in open Court gives notice of his appeal to the Supreme Court of the Territory of Arizona, from the Judgment entered against him herein.

42 And afterwards and upon to-wit the same day the following adjournment order was had and entered of record in said Court, which said adjournment order is in words and figures as follows, to-wit:

And thereupon the regular October Term, A. D., 1903, of the District Court of the Third Judicial District of Arizona, in and for Maricopa County, adjourned *sine die* and all business not otherwise disposed of is continued to the next term of this Court appointed by law.

43 And afterwards and upon to-wit the 20th day of April, A. D. 1904, the same being one of the regular juridical days of the April Term, A. D., 1904, of said Court, the following bond on appeal was filed in said Court in said cause, which said Bond on Appeal with the endorsements thereon is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JESSE HOYT SMITH, Plaintiff,
against
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Defendants.

Know all men by these presents: That we, Jesse Hoyt Smith, as Principal and R. H. Greene and Lloyd B. Christy as sureties are held and firmly bound unto Frank Luke and John Luke, in the sum of Two hundred (200) Dollars, lawful money of the United States, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The condition of the above obligation is such that,

Whereas, the above named principal Jesse Hoyt Smith the plain-

tiff in the above entitled action has appealed from the judg-
44 ment of the above named Court to the Supreme Court of the Territory of Arizona, which said judgment is in favor of the said obligees herein, and the Clerk of this Court having fixed the amount of the appeal bond herein at the sum of $200, that being at least double the amount of probable costs of this suit in the appellate Court and in this Court.

Now therefore if the said above bounden principal Jesse Hoyt Smith, shall prosecute his appeal to effect and shall pay all costs which shall have accrued in the Court below and which may accrue in the Appellate Court, then this obligation shall be void, otherwise to remain in full force and effect.

Dated this 19" day of April, 1904.

JESSE HOYT SMITH,
By C. F. AINSWORTH, *His Att'y.*
R. H. GREENE.
LLOYD B. CHRISTY.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

R. H. Greene and Lloyd B. Christy being each first duly sworn deposes and says for himself and not for the other, that he is a resident and freeholder of the County of Maricopa and Territory of Arizona; that he is worth the sum of Two hundred dollars over and above his just debts and liabilities exclusive of property exempt from execution.

R. H. GREENE.
LLOYD B. CHRISTY.

45 Subscribed and sworn to before me this 19th day of April, 1904.

C. F. AINSWORTH,
[SEAL.] *Notary Public, Maricopa County, Arizona.*

My Commission expires the 22nd day of November, 1905.

The above and foregoing bond is hereby approved both as to form and sufficiency of sureties.

Dated this 20 day of April, 1904.

ELIAS F. DUNLEVY,
Clerk of the District Court, 3d Judicial District, Territory of Arizona.

Endorsed: 4129. In the District Court, Third Judicial District, Territory of Arizona, County of Maricopa. Jesse Hoyt Smith *vs.* William J. Rainey & ors. Bond on Appeal. C. F. Ainsworth, Pl'ff's Att'y. Filed April 20, 1904, Elias F. Dunlevy, Clerk.

46 TERRITORY OF ARIZONA, *County of Maricopa, ss:*

I, Elias F. Dunlevy, Clerk of the District Court of the Third Judicial District of the Territory of Arizona, in and for the County

of Maricopa, do hereby certify the above and foregoing to be a true, complete and perfect transcript and copy of all the minute entires, Judgment Order and Bond on Appeal and all proceedings had and entered of record in a certain cause lately pending in said Court, wherein Jesse Hoyt Smith was plaintiff and William J. Rainey, *et al.*, were defendants, as the same remain on file and of record in my office.

And I further certify that the accompanying papers hereto attached are the original papers filed in my office and all thereof, except the Bond on Appeal, a copy of which is transmitted herewith.

And I further certify that the plaintiff's costs are $14.90, as appear to me of record, and the defendants' costs are $6.50.

In witness whereof I have hereunto set my hand and affixed the seal of said Court, at Phœnix, this 28th day of April, A. D., 1904.

ELIAS F. DUNLEVY,
Clerk of Said Court.

Transcript demanded April 20th 1904, by C. F. Ainsworth.
" delivered April 28th 1904, to C. F. Ainsworth.
ELIAS F. DUNLEVY, *Clerk.*

47 In the District Court, Third Judicial District, of the Territory of Arizona in and for the County of Maricopa.

JESSE HOYT SMITH, Plaintiff,
against
WILLIAM RAINEY ET AL., Defendant-.

I, the undersigned Clerk of the District Court of the Third Judicial District of Arizona Territory, in and for Maricopa County, do hereby certify the foregoing to be a true copy of the Judgment entered in the above-entitled action, and recorded in Judgment Book H of said Court, at page 85. And I further certify that the foregoing papers hereto annexed constitute the Judgment Roll in said action.

Witness my hand, and seal of the District Court, this 16 day of Jany. A. D., 1904.

[SEAL.]

ELIAS F. DUNLEVY, *Clerk,*
By J. E. STURGES,
Deputy Clerk.

(Endorsed:) No. 4129. In the District Court, Third Judicial District County of Maricopa, Territory of Arizona. Jesse Hoyt Smith, Plaintiff *vs.* William Rainey, *et al.* Defendant-. Judgment Roll. Filed Jany. 16, 1904. Elias F. Dunlevy, Clerk. J. E. Sturges, Deputy Clerk. No. 861. In the Supreme Court of the Territory of Arizona. Jesse Hoyt Smith, Appellant, *vs.* Wm. J. Rainey, *et al.*, Appellees. Original Papers. Filed May 19, 1904. S. M. Cullom, Clerk.

48 *Syllabus (by Nave, A. J.)*

To create an equitable mortgage or lien upon property, for the payment of a debt, an intention to create such must be manifest as distinguished from an intention to apply to the payment of the debt, the proceeds from the sale of the property.

An agreement construed, and held not to disclose an intention to create an equitable mortgage or lien upon property.

49 In the Supreme Court of the Territory of Arizona.

No. 861.

JESSE HOYT SMITH, Appellant,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Appellees.

Appeal from the District Court in and for Maricopa County; Before Chief Justice Edward Kent.

Action by Jesse Hoyt Smith against William J. Rainey *et al.* Judgment on demurrer in favor of the defendants Luke. Plaintiff appeals. Affirmed.

C. F. Ainsworth for Appellant.
A. C. Baker and Walter Bennett for Appellees.

NAVE, *A. J.:*

Appellant as plaintiff brought suit to foreclose an alleged equitable mortgage-lien upon certain property described in the complaint and alleged to be the property of William J. Rainey; in which property it was averred the defendants and appellees Frank Luke and John Luke claim to have some lien or interest. To the complaint the defendants Luke interposed a general demurrer. This demurrer was by the court sustained.

The plaintiff elected to stand upon his complaint, unamended. Whereupon, judgment was entered in favor of the defend-
50 ants Luke.

In substance the complaint sets forth that in March, 1897, the plaintiff and the defendant Rainey entered into a certain agreement set forth in full as an exhibit to the complaint and as a part thereof. In substance this agreement provided that whereas the parties thereto had on the day of its execution purchased a certain tract of land in Maricopa County, Arizona, for the sum of eighteen thousand dollars in the proportion of an undivided two-thirds interest in the said Smith, and an undivided one-third interest in the said Rainey; and

Whereas the said Smith had paid the entire purchase price, and

the said Rainey had agreed to repay to the said Smith one-third thereof with interest thereon as thereafter provided; and,

Whereas the said parties had joined in said purchase for the purpose of platting, grading and otherwise improving said property, and as so improved, selling and disposing of the same at a profit;

Therefore, the said parties agreed

1st. That the improvement of the tract should begin forthwith.

2nd. That the improvements should consist of surveying and platting the tract into lots, grading streets, planting trees, &c.

3rd. That the said Smith, in addition to the sum of eighteen thousand dollars was also from time to time to make all necessary advances of money for the improvements and for the incidental expenses of the enterprise.

51

4th. That all money advanced by the said Smith in said purchase, as well as all moneys advanced by him for any of the purposes aforesaid, should be considered as a loan by him and be paid to him as rapidly as possible from the receipts of sales, or other income of said property, until the same should be fully paid with interest, before any division of profits should be made.

5th. That if five years from the date of the agreement, all the loans should not have been fully paid to the said Smith with interest, the said Rainey thereby agreed that he would, on demand thereof, pay to the said Smith the one-third of all such loans then unpaid, including interest.

6th. That the said Rainey should have management of the tract and of the improving and sale of the same.

7th. That the said Rainey should keep and render accounts showing among other things, "all the assets and liabilities of the partnership."

8th. That the said Rainey thereby agreed to accept the general management of the said tract, without other consideration or remuneration than his one-third share in the net profits of the business, as thereafter provided.

9th. That after the repayment to the said Smith of the sum of eighteen thousand dollars and all other advances, with interest, the net profits of the business should be divided, two-thirds to Smith and one-third to Rainey; and the losses, if any, should be shared in the same ratio.

52

It was further stipulated that the memorandum of agreement was made "for the purpose of stating explicitly, the terms of the co-partnership on which the said Smith and Rainey had joined in the enterprise.

The complainant proceeds to state that pursuant to this agreement the plaintiff advanced in total the sum of sixty-five thousand dollars including the purchase price, no part of which has been repaid to plaintiff; that all of the money so advanced was used in the purchase and improvement of the property, including the undivided one-third interest therein of the defendant; that the plaintiff had performed each act incumbent upon him under the agreement, but that the defendant Rainey refused, and still neglects and refuses to perform any of his covenants and agreements; that none of the

property described had been sold or disposed of, and no part of the money repaid to the plaintiff; that the defendant, Lillian Rainey, wife of defendant William J. Rainey, and the defendants Luke each claim to have some lien or interest in on or upon the interest of the defendant Rainey in the said property, which liens, if any
53 there be, are each and all subject and subordinate to the lien of plaintiff.

Therefore the plaintiff prayed that he be declared to have an equitable mortgage lien in and upon the interest of the said William J. Rainey in the said property, to the extent of one-third of the aggregate of the amounts advanced by plaintiff, and that this lien be declared prior and superior to any liens claimed by any of the other defendants, if any they have, and that the said lien be foreclosed, and the interest of the said Rainey in the said property be sold as under execution.

The sole question upon this appeal is, whether this complaint states facts sufficient to constitute a cause of action against the defendants Luke. The contention of the appellant is,

1st. That the agreement set forth in the complaint "specifically points out and shows an intention to pledge the property purchased by plaintiff in his own name and that of the defendant Rainey, for the purpose of securing plaintiff in the repayment of all advances made by him in the purchase and improvement of the said property;" and that therefore the plaintiff has an equitable mortgage upon the interest of the said Rainey in the said property; and,

2nd. That by the demurrer the averment of the complaint that the lien or interest of the defendants Luke is subject and subordinate to the lien of plaintiff, is admitted.

In support of the first contention appellant cites, among
54 other authorities, the decision of the Supreme Court of California in the case of "Daggett *vs.* Rankin," 31st. Cal. 321, in which that court say:

"The doctrine seems to be well established that an agreement "in writing to give a mortgage, or a mortgage defectively executed, "or an imperfect attempt to create a mortgage, or to appropriate "specific property to the discharge of a particular debt, will create "a mortgage, in equity, or a specific lien on the property so in- "tended to be mortgaged."

Conceding this doctrine to be well established, we are unable to perceive that it can be applied to the facts in this case. We do not construe the agreement entered into between Smith and Rainey, as disclosing an intention to appropriate or set apart the tract of land in question or the interest therein of the defendant Rainey, as security for the advances of appellant. "The intention must be to create a lien upon the property, as distinguished from an agreement to apply the proceeds from the sale of it to the payment of the debt." Jones on Liens, Sec. 32.

The agreement in this case was, that the proceeds of the sales of the lots into which the tract of land was to be subdivided should be

applied first to the repayment of appellant's advances, and second, to the payment of profits to the partners in the enterprise.

Therefore in our judgment, the complaint does not disclose that appellant has an equitable lien or mortgage upon Rainey's
55 interest in the tract.

In view of this conclusion it is unnecessary to consider what is the effect of the demurrer with respect to the averment of the complaint that the lien, if any, of the defendants Luke is subordinate to plaintiff's lien. It not appearing that the plaintiff in the cause has any interest equitable or otherwise in the property in question, he has no lien to which any lien or other interest of the defendants Luke can be subordinate.

The demurrer was properly sustained. The judgment of the district court is affirmed.

FREDERICK S. NAVE, *A. J.*

We concur:

RICHARD E. SLOAN, *A. J.*
FLETCHER M. DOAN, *A. J.*
JOHN H. CAMPBELL, *A. J.*

(Endorsed:) No. 861. In the Supreme Court of the Territory of Arizona. Jesse Hoyt Smith, *vs.* Wm. J. Rainey, *et al.* Opinion. Filed Jan'y 9, 1906. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

56 In the Supreme Court of the Territory of Arizona

No. 861.

JESSE HOYT SMITH, Appellant,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Appellees.

The above named appellant considering himself aggrieved by the final judgment and decree entered on the 9" day of January, 1906, in the above court in the above entitled proceedings, wherein the judgment of the District Court of the Third Judicial District of the Territory of Arizona in and for Maricopa County, sustaining the demurrer of the appellees to the complaint of the appellant is sustained and affirmed, doth hereby appeal from the said judgment of the above court to the Supreme Court of the United States, and prays that this appeal be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

C. F. AINSWORTH,
Attorney for Appellant.

Now on this 20" day of January, 1906, the appeal prayed for in the foregoing petition is hereby allowed; citation to issue on appellant filing a bond in the penal sum of $1000.00, with
57 good and sufficient sureties as is required by law to be approved by an Associate Justice of the Supreme Court of the Territory of Arizona.

RICHARD E. SLOAN,
Justice of the Supreme Court
of the Territory of Arizona.

(Endorsed:) No. 861. In the Supreme Court of the Territory of Arizona. Jesse Hoyt Smith, Applt. *vs.* William J. Rainey, *et als.* Appellees. Petition for allowance of appeal and order. C. F. Ainsworth, Atty. for Applt. Filed Jany. 22, 1906. S. M. Cullom, Clerk.

58 In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Appellant,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Appellees.

The above entitled cause having been argued and submitted to this court at the October Term, 1905, thereof, and the judgment appealed from having been on the 9th day of January, 1906, in all things affirmed by this Court, and the appellant desiring to prosecute an appeal to the Supreme Court of the United States from the judgment of this Court in this case, and having applied for a statement of facts in this case in the nature of a special verdict, pursuant to Acts of Congress in such case made and provided,

Now therefore, this Court, on this 24th day of January, 1906, the same being a day of the January 1906 Term of said Court, makes and files the following statement of facts, to-wit:—

That this action was commenced by the filing with the clerk of the trial court of a complaint for the establishment of an equitable mortgage lien upon the premises therein set forth and for the sale of said premises for the payment of said lien alleged to amount
59 to the sum of $22133.83 with interest; this complaint was thereafter amended, alleging however substantially the same cause of action, and said amended complaint was filed with said clerk of the trial court on the 31st day of December, 1903.

That on the 7th day of October, 1903, the defendants Rainey filed their answer, denying substantially all the allegations of the complaint, and on the 13th day of October, 1903, the defendants Luke filed in said trial court a demurrer and answer to said complaint, which demurrer was argued and submitted to the trial court, and on the 28th day of November, 1903, the said trial court sustained the said demurrer of the defendants Luke, and on the 16th day of November 1903, the trial court entered its judgment sustaining

the said demurrer and dismissed the complaint as to the defendant Luke.

From the said judgment entered as above, the appellant Jesse Hoyt Smith appealed to this court, and said appeal was perfected; and submitted to this court on the 25th day of January, 1905, and the said judgment of the trial court in the above action was by this court on the 9th day of January, 1906, in all things affirmed.

RICHARD E. SLOAN,
Associate Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 861. In the Supreme Court of the Territory of Arizona. Jesse Hoyt Smith, Appellant, *vs.* William J. Rainey and Lillian Rainey his wife, Frank Luke and John Luke, Appellees. Statement of facts. C. F. Ainsworth, Atty. for Appellant. Filed Jany. 25, 1906, S. M. Cullom, Clerk.

60 In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff-Appellant,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Defendants-Appellees.

Know all men by these presents that we, Jesse Hoyt Smith as principal and the American Surety Company of New York, a corporation, as surety, are held and firmly bound unto William J. Rainey and Lillian Rainey his wife, Frank Luke and John Luke, their executors, administrators and assigns, in the sum of One thousand (1000) Dollars, lawful money of the United States, to be paid to the said William J. Rainey, Lillian Rainey, Frank Luke and John Luke, their executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, assigns and successors, jointly and severally, firmly by these presents.

Dated this 23rd day of January, 1906.

Whereas the above named appellant Jesse Hoyt Smith has appealed to the Supreme Court of the United States from the final judgment rendered by the above named court in the above entitled action, and the said above named appellant having obtained an allowance of his appeal to the Supreme Court of the United
61 States, and a citation directed to the above named appellees is about to be issued citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C.,

Now the condition of the above obligation is such that if the said Jesse Hoyt Smith the above named appellant shall prosecute his said appeal to effect, and shall answer all damages and costs that may be awarded against him, if he fails to make his plea good, then

the above obligation is to be void; otherwise to remain in full force and virtue.

JESSE HOYT SMITH,
By C. F. AINSWORTH,
His Attorney in Fact.
AMERICAN SURETY COMPANY OF NEW YORK,
[SEAL.] By W. K. JAMES, *Resident Vice-President.*
Attest
C. F. AINSWORTH,
Resident Assistant Sec'y.

The above and foregoing bond is hereby approved both as to form and sufficiency of sureties, this 23rd day of January, 1906.

RICHARD E. SLOAN,
Associate Justice of the Supreme Court of Arizona.

(Endorsed:) No. 861. In the Supreme Court of the Territory of Arizona. Jesse Hoyt Smith, Appellant, *vs.* William J. Rainey and Lillian his wife, Frank and John Luke, Appellees. Cost Bond on Appeal to the Supreme Court of the United States. C. F. Ainsworth, Attorney for Appellant. Filed Jan'y 25, 1906. S. M. Cullom, Clerk.

62 In the Supreme Court of the Territory of Arizona.

No. 861.

JESSE HOYT SMITH, Plaintiff-Appellant,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Defendants-Appellees.

Assignment of Errors.

And now comes the above named appellant Jesse Hoyt Smith, by C. F. Ainsworth, his attorney and says that in the record and proceedings in the above entitled cause in the Supreme Court of the Territory of Arizona, there is manifest error in this, to-wit:

1. The said Supreme Court of the Territory of Arizona erred in not reversing the judgment of the trial court sustaining the demurrer of the Appellees to the second amended complaint of the plaintiff-appellant.

2. The Supreme Court of the Territory of Arizona erred in affirming the judgment of the trial court sustaining the demurrer of the appellees to the second amended complaint of the plaintiff-appellant.

3. The Supreme Court of the Territory of Arizona erred in holding that the complaint does not disclose that appellant has an equitable lien or mortgage upon Rainey's (Appellee) interest in

the property, and that the appellant has no interest equitable
63 or otherwise in the property in question.

4. The Supreme Court of the Territory of Arizona erred in holding that the agreement entered into between the appellant Jesse Hoyt Smith and the appellee William J. Rainey, and set out in the second amended complaint herein, does not disclose an intent to appropriate or set apart the property or land in question or the interest therein of the defendant-appellee Rainey, as security for the advances of the appellant.

Wherefore appellant prays that this cause be reversed and that the judgment of the Supreme Court of the Territory of Arizona be reversed, annulled and held for naught; that the appellant recover his costs herein, and for such other proper orders in the premises as may be just.

C. F. AINSWORTH,
Attorney for Appellant.

[Endorsed:] No. 861. In the Supreme Court of the Territory of Arizona. Jesse Hoyt Smith, Appellant, *vs.* William J. Rainey, *et als.* Appellees. Assignment of Errors. C. F. Ainsworth, Attorney for Appellant, Phœnix, Ariz. Filed Feb'y 15, 1906. S. M. Cullom, Clerk.

64 In the Supreme Court of the Territory of Arizona.

Be it remembered that heretofore and on to-wit the 25th day of January A. D., 1905, the same being one of the regular juridical days of the January Term A. D., 1905, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

No. 861.

JESSE HOYT SMITH, Appellant,
vs.
WILLIAM J. RAINEY ET AL., Appellees.

On motion of Mr. Walter Bennett, attorney for Appellees herein, It is ordered that this cause be submitted on briefs.

And afterwards and upon to-wit the 1st day of April A. D., 1905, the same being one of the regular juridical days of the January Term A. D., 1905, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 861.

JESSE HOYT SMITH, Appellant,
vs.
WILLIAM J. RAINEY ET AL., Appellees.

It is ordered by the Court that this cause be re-submitted on briefs.

65 And afterwards and upon to-wit the 9th day of January, A. D. 1906, the same being one of the regular juridical days of the January Term A. D., 1906 of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 861.

JESSE HOYT SMITH, Appellant,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Appellees.

(*Judgment.*)

This cause having been heretofore submitted and by the Court taken under consideration, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the district court be, and the same is, hereby affirmed.

It is further ordered, adjudged and decreed that the Appellees herein do have and recover of and from Jesse Hoyt Smith, Appellant herein and R. H. Greene and Lloyd B. Christy, sureties on appeal bond, their costs in this court, taxed at Twenty-four and 30/100 ($24.30) Dollars, and their costs in the Court below in this cause incurred.

And afterwards and upon to-wit the 20th day of January, A. D., 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order,
66 *inter alia*, was had and entered of record in said Court, in said cause, which said order is in words and figures, as follows, to-wit:

No. 861.

JESSE HOYT SMITH, Appellant,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE, Appellees.

Comes now, C. F. Ainsworth, Esq., attorney for Appellant herein, and gives notice of appeal from the judgment of this Court to the

Supreme Court of the United States, and moves the court that the appeal be allowed.

It is ordered by the Court that said motion be granted and the appeal be and the same is hereby allowed.

It is further ordered that the amount of the Bond on Appeal be fixed in the sum of One Thousand ($1000.) Dollars.

And afterwards and upon to-wit the 24th day of January, A. D. 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 861.

JESSE HOYT SMITH, Appellant,
vs.
WILLIAM J. RAINEY ET AL., Appellees.

67 On motion of Mr. C. F. Ainsworth, attorney for appellant herein, it is ordered that he be granted leave to present Statements of Facts.

68 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Territory of Arizona, ss:*

I, Shelby M. Cullom, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 67, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Jesse Hoyt Smith, Appellant, against William J. Rainey and Lillian Rainey, his wife, Frank Luke and John Luke, Appellees, as the same remain of record and on file in my office.

I further certify that the Citation attached hereunto, is the original Citation issued by said Supreme Court of the Territory of Arizona, in said above entitled cause.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court, at Phœnix, Arizona, this 5th day of May, 1906.

[Seal Supreme Court of Arizona.]

S. M. CULLOM,
Clerk Supreme Court of Arizona.

69 UNITED STATES OF AMERICA, *ss:*

The President of the United States to William J. Rainey, Lillian Rainey his wife, Frank Luke and John Luke, Appellees; Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within sixty days from the date hereof, pursuant to an appeal filed in the clerk's office of the Supreme Court of the Territory of Arizona wherein Jesse Hoyt Smith is appellant, and you are appellees, to show cause if any there be, why the judgment rendered against the appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 24th day of January, in the year of our Lord one thousand nine hundred and six.

[Seal Supreme Court of Arizona.]

RICHARD E. STONE,
Associate Justice of the Supreme Court of the Territory of Arizona.

Service of the within citation and receipt of a copy thereof admitted this 30th day of January, 1906.

WALTER BENNETT,
Attorney for Appellees Luke in Lower Court.
CHALMERS & WILKINSON,
Attorneys for Appellees Rainey in Lower Court.

70 [Endorsed:] No. 861. Supreme Court of the Territory of Arizona. Jesse Hoyt Smith, Appellant, *vs.* William J. Rainey *et als.*, Appellees. Citation. C. F. Ainsworth, Att'y for Appellant. Filed Jan'y 25 1906 S. M. Cullom, Clerk.

Endorsed on cover: File No. 20,439. Arizona Territory supreme court. Term No. 144. Jesse Hoyt Smith, appellant, *vs.* William J. Rainey, Lillian Rainey, his wife; Frank Luke, and John Luke. Filed October 29th, 1906. File No. 20,439.

(20,439.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907,

No. 144.

JESSE HOYT SMITH, *Appellant,*

vs.

WILLIAM J. RAINEY, LILLIAN RAINEY, His Wife, FRANK LUKE, and JOHN LUKE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Supreme Court of the Territory of Arizona, affirming a judgment of the District Court of that Territory in favor of the defendants Frank Luke and John Luke, and dismissing the amended complaint of the above named appellant Jesse Hoyt Smith on a demurrer to said complaint, for the reason that the amended complaint fails to state a cause of action. The amended complaint, to which this demurrer was sustained, will be found on pages 3, 4, 5, 6 and 7 of the printed record. It alleges in substance:

First: The residence of the parties to the action.

Second: That the defendant Lillian Rainey is the wife of William J. Rainey.

Third: That on or about the 20th day of March, 1897, the plaintiff and the defendant William J. Rainey entered into a written agreement for the joint purchase, management, control and sale of certain real property in the Territory of Arizona fully described in the complaint, of which agreement a copy is annexed to said complaint marked "Exhibit A" and is as follow:

"This Memorandum of Agreement, Made this 20th day of "March, 1897, by and between Jesse Hoyt Smith, of Milwau- "kee, Wisconsin, and William J. Rainey, of Cleveland, Ohio, "parties hereto, Witnesseth: that whereas the said parties have "this day purchased a certain tract of land known as Section 22 "Township 2 North, Range 3 East of G. and S. R. Meridian, "Maricopa County, Arizona, except the N. W. ¼ of the N. W. "¼ of said section, for the sum of Eighteen Thousand Dollars "($18,000) in cash, said tract of land having been purchased by "the said parties in the proportion of an undivided two-thirds "(2-3) interest to the said Jesse Hoyt Smith and an undivided "one-third (1-3) interest to the said William J. Rainey accord- "ing to a deed now on record in the office of the County Record- "er of Maricopa County, Arizona, in Book 43 of Deeds, pages "565-6-7;

"And whereas the said tract of land was so conveyed free "and clear of all liens and incumbrances, and the full considera- "tion for the whole thereof, being Eighteen Thousand Dollars "($18,000) was paid in cash by said Jesse Hoyt Smith, and said "William J. Rainey has agreed to repay to said Jesse Hoyt "Smith the one-third (1-3) thereof with interest thereon at 6 "per cent. per annum as hereinafter provided;

"And whereas said parties have joined in said purchase for "the purpose of platting, grading and otherwise improving said "property, and as so improved selling and disposing of the same "at a profit.

"Now, Therefore, the parties hereto do, and each for himself "doth, agree with the other in the manner following:

"First. That the improvement of said tract of land shall be "commenced not later than the 1st day of January, 1898, and "such improvements be thereafter continued with reasonable "diligence and dispatch until the same shall be in marketable "condition as lots.

"Second. That the improvements aforesaid shall consist of "the surveying and platting the entire tract into lots, the open- "ing up and grading of all the streets; the planting of suitable "shade, ornamental and fruit trees, and the making of all such

"other improvements as may be hereafter agreed upon between "the parties hereto.

"Third. That said Jesse Hoyt Smith, in addition to the sum "of Eighteen Thousand Dollars ($18,000) so advanced by him "as aforesaid, shall also from time to time make all necessary "advances of money for the improvements aforesaid, and also all "such as shall be required for the running and incidental ex-"penses of the undertaking, including taxes, irrigation charges, "marketing said lots and the reasonable and necessary expenses "of said William J. Rainey from Cleveland, Ohio, to Phoenix, "Arizona, and return, and his living expenses when in Arizona "while engaged in business relating to said property.

"Fourth. That all money advanced by said Jesse Hoyt "Smith in said purchase, as well as all such as shall be hereafter "advanced by him for any of the purposes aforesaid, shall be "considered and treated as a loan or loans by him, and shall be "paid to him as rapidly as possible from the receipts from the "sale or sales or other income of said property until the same "shall be fully paid with interest at 6 per cent. per annum and "before any division of profits shall be made or paid.

"Fifth. That if at the date of five (5) years from the date "hereof, all the loans aforesaid shall not have been fully paid to "said Jesse Hoyt Smith, with interest as above provided, then "and in that event said William J. Rainey hereby agrees that "he will on demand thereafter pay to said Jesse Hoyt Smith "the one-third (1-3) of all such loans then unpaid, including "interest thereon as aforesaid.

"Sixth. That said William J. Rainey shall have general "management of said tract of land including the improvements "thereof as aforesaid, and the employment of all labor and mak-"ing of all contracts necessary therefor, and also including the "handling and sale of said lots when so improved; provided, "however, that no contracts or other obligation on account of "said property exceeding in the aggregate the sum of Five Thou-"sand Dollars ($5,000.00) shall be entered into without the pre-"vious written consent of said Jesse Hoyt Smith, and no con-"tract for the sale of any such lots shall be made except at prices "and on terms to be agreed upon between the parties hereto; pro-"vided always that said William J. Rainey shall at all times and "from time to time give to said Jesse Hoyt Smith true accounts "of all transactions relating to the business, and full informa-"tion in regard to all matters which shall come to his hands or "knowledge respecting such business, and shall give due regard "to his wishes and directions respecting the same.

"Seventh. That said William J. Rainey shall keep full, "true, correct and proper books of account of all the transac- "tions and dealings relating to said business, which shall at all "times be open to the inspection of said Jesse Hoyt Smith; and "that he will on the 10th day of each month render to said Jesse "Hoyt Smith an account in full of all transactions during the "preceding month including all contracts made and all dis- "bursements and receipts, and showing all the assets and lia- "bilities of the partnership.

"Eighth. That said William J. Rainey hereby agrees to "accept the said general management of said tract of land, "without other consideration or remuneration excepting only "his one-third (1-3) share in the net profits of such business "as is hereinafter provided.

"Ninth. That after the re-payment to said Jesse Hoyt "Smith of the said sum of Eighteen Thousand Dollars ($18,- "000) so advanced by him for the purchase of said tract and "the re-payment of all advances which shall be hereafter made "by him on account of said property or said business, together "with interest on all such sums at six (6) per cent. per annum, "the net profits of said land and said business shall be divided "between the parties hereto as follows: Said Jesse Hoyt Smith "shall be entitled to the two-thirds (2-3) thereof, and said "William J. Rainey the one-third (1-3) thereof; and the losses "if any, shall be shared between the parties in ratio aforesaid.

"It is further agreed and understood between the parties "hereto that this Memorandum of Agreement is made for the "purpose of stating explicitly the terms of co-partnership on "which the said Jesse Hoyt Smith and William J. Rainey have "joined in the purchase, improvement and sale of said tract or "lots and that each will fulfill in good faith and to the best of "his ability the articles herein contained. Which covenants and "agreements shall extend to and bind the respective parties and "their respective legal representatives.

"In Witness Whereof the parties hereto have hereunto "set their hands and seals the day and year first above written.

"J. Hoyt Smith. (Seal.)
"Wm. J. Rainey, (Seal.)

"In Presence of
"J. W. Dadmun.
"Z. M. Chandler."

Fourth: That pursuant to the terms of said agreement the plaintiff advanced all the purchase price of said property, to-wit, Eighteen Thousand Dollars ($18,000), and, in addition

thereto, advanced for the improvement thereof, pursuant to said agreement, various sums of money, aggregating, with interest, Sixty-five Thousand Three Hundred and Sixteen Dollars and Fifty-one Cents ($65,316.51) up to May 23, 1903, and since that date One Thousand and Eighty-five Dollars ($1,085), no part of which several sums have ever been repaid to the plaintiff.

Fifth: That all of the purchase money, so advanced as aforesaid by the plaintiff herein, was used in the purchase and improvement of the property in the complaint described, including the undivided one-third interest therein of the defendant William J. Rainey, and was so advanced under and pursuant to the terms and stipulations in said agreement contained.

Sixth: That the plaintiff has done each and every of the agreements and stipulations set forth in said agreement, on his part to be performed, but that said defendant William J. Rainey has neglected and refused, and still neglects and refuses, to do or perform any of the covenants or agreements in said agreement mentioned.

Seventh: That none of the property in said complaint described has ever been sold or disposed of, and that no part of the money, so advanced as aforesaid by the plaintiff, has ever been repaid to this plaintiff, and all of said sums of money, so advanced, are still due to the plaintiff.

Eighth: That the defendants Lillian Rainey, Frank Luke and John Luke each claim to have some lien or interest in, on or upon the interest of the defendant William J. Rainey in the property in said complaint described, which liens, if any there be, are each and all subject and subordinate to the lien of the plaintiff.

Wherefore the plaintiff prays judgment:

First: That the plaintiff be declared to have an equitable mortgage lien in and upon the interest of said defendant William J. Rainey in the property in said complaint described, to

the extent of one-third of the several sums of money so advanced by the plaintiff for the purchase and improvement of the said property, together with interest thereon, to-wit: for the sum of Twenty-one Thousand Seven Hundred and Seventy-two Dollars and Seventeen Cents ($21,772.17) with interest thereon from the 23d day of May, 1903, and Three Hundred and Sixty-one Dollars and Sixty-six Cents ($361.66) with interest thereon, at the rate of six per cent. per annum.

Second: That said mortgage or equitable lien be declared to be prior and superior to any liens claimed by the defendants, if any they have.

Third: That the plaintiff have judgment foreclosing said equitable lien upon the interest of the defendant William J. Rainey in the property in said complaint described, for the full amount of said lien; and that all of the defendants be foreclosed of all right, title and interest in the premises; also for such other and further relief as may be just and equitable.

To the foregoing complaint the defendants Frank Luke and John Luke interposed a demurrer (page 12 of printed record) on the ground, among other things, that the complaint does not state facts sufficient to constitute any cause of action against said defendants or either of them, or for any relief whatever as against said defendants or either of them.

This demurrer was sustained by the trial Court, and the plaintiff having elected to stand upon the complaint, judgment was entered that the complaint be dismissed as to the defendants Frank Luke and John Luke with costs (page 21 of printed record).

An appeal having been taken to the Supreme Court of the Territory of Arizona, the judgment of the lower court was affirmed (page 28 of printed record). The opinion of the Supreme Court will be found on pages 25, 26, 27 and 28 of the printed record.

From that decision this appeal is taken.

ASSIGNMENTS OF ERROR.

First: The Supreme Court of the Territory of Arizona erred in not reversing the judgment of the trial court sustaining the demurrer of the appellees to the second amended complaint of the plaintiff-appellant.

Second: The Supreme Court of the Territory of Arizona erred in affirming the judgment of the trial court sustaining the demurrer of the appellees to the second amended complaint of the plaintiff-appellant.

Third: The Supreme Court of the Territory of Arizona erred in holding that the complaint does not disclose that appellant has an equitable lien or mortgage upon Rainey's (appellee) interest in the property, and that the appellant has no interest, equitable or otherwise, in the property in question.

Fourth: The Supreme Court of the Territory of Arizona erred in holding that the agreement entered into between the appellant Jesse Hoyt Smith and the appellee William J. Rainey and set out in the amended complaint, does not disclose an intent to appropriate or set apart the property or land in question, or the interest therein of the defendant-appellee Rainey, as security for the advances of the appellant.

ARGUMENT.

A separate discussion of the first two assignments of error is unnecessary, since, if the Supreme Court of Arizona was in error as claimed in the third and fourth assignments, it necessarily follows that the first and second assignments are well taken.

The written instrument set up in the complaint must be construed as an equitable mortgage.

In the opinion of the Supreme Court of Arizona the following language is used:

"The contention of the appellant is,

"1st. That the agreement set forth in the complaint 'spe-"cifically points out and shows an intention to pledge the prop-"erty purchased by plaintiff in his own name and that of the "defendant Rainey, for the purpose of securing plaintiff in the "re-payment of all advances made by him in the purchase and "improvement of the said property;' and that therefore the "plaintiff has an equitable mortgage upon the interest of the "said Rainey in the said property; * * *

"Conceding this doctrine to be well established, we are un-"able to perceive that it can be applied to the facts in this "case. We do not construe the agreement entered into between "Smith and Rainey, as disclosing an intention to appropriate "or set apart the tract of land in question or the interest therein "of the defendant Rainey, as security for the advances of appel-"lant. * * *

"The agreement in this case was, that the proceeds of the "sales of the lots into which the tract of land was to be sub-"divided should be applied first to the repayment of appellant's "advances, and second, to the payment of profits to the part-"ners in the enterprise.

"Therefore in our judgment, the complaint does not disclose "that appellant has an equitable lien or mortgage upon "Rainey's interest in the tract. * * *

"It not appearing that the plaintiff in the cause has any "interest equitable or otherwise in the property in question, he "has no lien to which any lien or other interest of the defendant "Luke can be subordinate."

The Court will observe that the Supreme Court of Arizona was in error when it said that the agreement in this case was, that the proceeds of the sales of the lots into which the tract of land was to be subdivided should be applied first to the re-payment of appellant's advances, and second, to the payment of profits to the partners in the enterprise. The fourth clause of the agreement provides:

"That all money advanced by said Jesse Hoyt Smith in said "purchase, as well as all such as shall be hereafter advanced by "him for any of the purposes aforesaid, shall be considered and "treated as a loan or loans by him, and shall be paid to him as "rapidly as possible from the receipts from the sale or sales or "*other income* of said property until the same shall be fully paid

"with interest at six per cent. per annum and before any divi-
"sion of profits shall be made or paid;"

so that the agreement in question pledges not only the proceeds of the sales, but also the rents and profits of the land in question, for the payment of the plaintiff's debt against Rainey.

This Court has used the following language:

"It is clear that if the express intention of the parties was "to create an equitable lien upon the bonds or the value thereof, "or if such intention arises by a necessary implication from the "terms of the agreement construed with reference to the situ-
"ation of the parties at the time of the contract, and by the "attendant circumstances, such equitable lien will be enforced "by a court of equity against the bonds in the hands of Brown "or against third persons who are volunteers or have notice."

Walker vs. Brown, 165 U. S., 664.

In an earlier case this Court said a party may, by agreement, create a charge or claim in the nature of a lien on real as well as on personal property whereof he is the owner or in possession, which a court of equity will enforce against him, and volunteers or claimants under him with notice of the agreement.

Ketcham vs. St. Louis, 101 U. S., 306.

In the foregoing case the doctrine established in the case of *Legard vs. Hodges*, 1 Vesey, Jr., 477, was distinctly approved. In that case it was expressly held that a covenant to set apart and pay annual profits of land as security for a debt is in equity a lien on the land against the covenantor and claimants under him with notice.

In the case of *Strand Music Hall Company*, 3 *De G., J. & S.*, 147, which was expressly approved in *Ketcham vs. St. Louis*, *supra*, the court used the following language:

"There can, I think," said Lord Justice Turner, "be no "doubt that it was intended by these agreements to create a "charge upon the property of the company, but it was said on "the part of the official liquidator that this intention was not "well carried into effect. I apprehend, however, that where "this court is satisfied that it was intended to create a charge, "and that the parties who intended to create it had the power "to do so, it will give effect to the intention, notwithstanding

"any mistake which may have occurred in the attempt to "effect it."

In the case of *Pinch vs. Anthony, et al.*, 8 *Allen*, 539, the following language was used:

"On looking at the agreement set out in the bill, there is no "room for doubt as to the intent of the parties to give to the "plaintiff a claim on the lands therein described, as security for "the money which they stipulated to pay to him. The agree- "ment is not only that he shall have an interest in the proceeds "of the sale of said lands, if the same should be sold, or a cer- "tain amount of stock in a joint stock company, if one should "be formed, for the amount which they agreed to pay, but it is "expressly stipulated that the amount due to him, 'whether of "cash or stock, is to be a charge on the joint estate of the parties, "in proportion to their respective interests,' to the extent of five "thousand dollars, and the residue of the sum, being fifteen "hundred dollars, 'is to be a charge on the separate estate' of "one of the parties. *It is difficult to see how an intent to create "a lien on the lands named could be more clearly expressed.*"

In the case at bar the agreement was that

"All money advanced by said Jesse Hoyt Smith in said pur- "chase, as well as all such as shall be hereafter advanced by him "for any of the purposes aforesaid, shall be considered and "treated as a loan or loans by him, and shall be paid to him as "rapidly as possible from the receipts from the sale or sales or "other income of said property until the same shall be fully paid "with interest at six per cent. per annum and before any divi- "sion of profits shall be made or paid."

Would it be possible to have manifested an intention to create a lien on Rainey's interest in this land for the repayment of Smith's advances more clearly than by this language?

We will now review other adjudicated cases, where various agreements have been held to constitute an equitable lien or mortgage.

An instrument executed by one of two joint purchasers of land for speculative purposes, to the other, who furnished all the purchase money, promising to pay within a given time a stated amount, recited therein as being for the purchase money

of his interest in certain lands jointly purchased by them, is an equitable mortgage.

Leiweke vs. Jordan, 59 Mo. App., 619.

It was shown that in 1883 the plaintiff and Jordan entered into a verbal contract by which they were to buy lands and it was understood that the plaintiff was to furnish the purchase price of the property, which was to be paid plaintiff when sales were effected; that this contract was made in 1883, and that lands were bought and the contract kept alive until December 30, 1886, when a settlement was had, which resulted in Jordan executing to the plaintiff the following instrument in writing:

"$600. Linn, Mo., Dec. 30th, 1886.

"Twelve months after date I promise to pay to the order of "A. Leiweke six hundred dollars, for value received, negotiable "and payable without defalcation or discount, and with interest "from this————at the rate of eight per cent. per annum, and "if the interest be not paid annually to become as principal and "bear the same rate of interest, and being for the purchase "money of my interest in (certain described lands.)

"HUGH JORDAN."

The court say:

"The trial court found and adjudged that, by the execution "of the instrument of writing quoted in the foregoing statement, "Jordan attempted to, and did, create an equitable charge or "lien in plaintiff's favor on the real estate named therein, and "we are of the same opinion. We think when Jordan made that "writing and delivered it to plaintiff, it was clearly the inten-"tion to charge his half interest in the real estate therein de-"scribed (and which he and plaintiff had purchased in com-"mon) with a lien for the payment of said $600. * * * Every "express executory agreement in writing whereby the contract-"ing party sufficiently indicates an intention to make some par-"ticular property therein described a security for a debt, creates "an equitable lien upon the property thus described; which too "is enforcible against the property, not only while held by the "only original contractor, but as well in the hands of his heirs, "administrators, voluntary assignees and purchasers with "notice."

Leiweke vs. Jordan, 59 Mo. App., 619-622, 623.

A written agreement by the owner to pay the occupant of certain land a given sum, conditioned that when the land was sold to enable the owner to realize the amount, the occupant should surrender his possession, and meantime giving him the occupancy in lieu of paying him interest on this sum, was held to constitute an equitable mortgage, and amounted to a specific lien on the land.

"An agreement in writing to give a mortgage, a mortgage "defectively executed, or an imperfect attempt to create a "mortgage, or to appropriate specific property to the discharge "of a particular debt, will create a mortgage in equity, or a "specific lien on the property so mortgaged."

Blackburn vs. Tweedie, 60 Mo. 505-507.

Promissory notes reciting "The consideration for which this "note is given is the following described lands lying in Coffee "County," with an immediate description of the lands by the "governmental survey, held; that "the notes declare a lien on "the lands described which must be enforced," and that they "operate as an equitable mortgage."

Bryant, Admr. vs. Stephens, et al., 58 Ala., 636-641.

"It is however well settled, that a covenant or written con- "tract to set apart and pay the rents and profits of particular "specified lands or the proceeds of their sale to the payment of a "debt, is in equity a lien on the land against the owner and all "persons claiming under him with notice."

Smith vs. Patton, 12 W. Va., 541-554.

"Accordingly an agreement that a debt shall be paid out of "the proceeds of certain property, or that the property shall be "*bound* for the debt, has been usually construed to create an "equitable mortgage."

Powell vs. Jones, 72 Ala., 392-398.

A note was made as follows:

"On or before the 17th day of May next, I promise to pay to "M. W. Puckett four hundred and eighty-nine dollars and thir- "teen cents, as purchase money, furnished by M. W. Puckett, "and to have the same effect as though the land had been bought "from M. W. Puckett, it being the farm I now live on this Sept. "17th, 1874. This note to draw 10 per cent. interest from date "until paid."

Held to create an equitable lien upon the land.

Trimble vs. Puckett, 93 Ky., 218.

"Wherever it appears by writing signed by a debtor that he "intends to charge his debt upon certain property of his own, "courts of equity, at the instance of the creditor, will effectuate "the intention."

Ruffners vs. Putney, et al., 12 Gratt., 541-551.

A having joined as a surety for B in a bond to C for securing the payment of the interest of a principal sum secured by a mortgage from B to C, and having also executed a warrant of attorney as a collateral security with the bond, afterwards executed to C a letter of attorney authorizing C to take possession of a rectory and glebe lands of which A was the incumbent and of certain freehold lands and hereditaments of which he was seized in fee simple, and to hold such possession and receive and take the fees, perquisites, emoluments, rents and profits thereof, until thereby and therewith, or otherwise, he should be paid the interest secured by the bond and warrant of attorney.

Held, that the letter of attorney operated not merely as a letter of attorney, but also as a charge on the freehold estates, and C was entitled to retain possession of the freehold estates until by means of the rents and profits all arrears of the interest should be satisfied, notwithstanding the death of A and the revocation by that event of the power of attorney.

Spooner vs. Sandilands, 1 Younge & Coll., 390.

Plaintiff and defendant were husband and wife, and the latter owned land derived from the former. As an investment of plaintiff's means, it was agreed that he should build a house on her land, she promising that if he should become distressed for the money he might sell the property at any time, and saying it was entirely at his disposal. Relying on this arrangement, he built the house, greatly enhancing the value of the property, whereupon defendant refused to re-convey the property to him, and denied his interest therein.

Held, that plaintiff had an equitable lien on the land and building for the value of the improvement, to satisfy which they might be sold.

Smith vs. Smith, 4 N. Y. Supp., 669.

The only doctrine which can be deduced from the cases cited, and many others which might have been cited, is that, where it is apparent from a written instrument, whatever its form, that the maker of that instrument intended to pledge or set apart specific real or personal property as security for the payment of a debt, such an instrument will be treated by a court of equity as a mortgage and enforced as such.

The written instrument in the case at bar is clearly such an instrument. It recites the purchase of certain land in the proportion of an undivided two-thirds to the appellant and an undivided one-third to the defendant William J. Rainey. It further recites that the appellant has advanced the entire purchase money, one-third of which the defendant Rainey agrees to repay with interest; that the parties have joined for the purpose of platting, grading and otherwise improving said property, and, as so improved, selling and disposing of the same at a profit; that the appellant is to advance such further sums as may be necessary for the improvement of the property, one-third of which the defendant Rainey agrees to repay with interest; that the entire proceeds of sales and all income derived from the property is to be first applied to the payment of appellant's indebtedness, and, if not paid in that manner within five years, the defendant Rainey agrees that he will then on demand pay the entire sum with interest.

We have therefore an instrument creating a debt and designating certain real estate to be appropriated for its payment. It cannot be claimed that, where the agreement provides that the proceeds of sales and all income shall be applied to the payment of the debt, the land itself is nevertheless not subject to that debt; since a court of equity will, if the entire beneficial interest in any property, real or personal, be pledged or ap-

propriated for the payment of the debt, decree that the thing itself or the property itself is so appropriated.

Suppose that, instead of real estate, the agreement had provided that certain negotiable bonds should be held as security for that debt, and that the proceeds of their sale and all income derived from them should be first applied to the payment of that debt before any division of profits should be had, and a subsequent creditor of the pledgor urged that that did not appropriate the bonds themselves for the payment of that debt. Certainly, no court of equity would listen for a moment to such a claim. The position of the appellee in this case and of the Supreme Court of Arizona is, however, precisely that although the proceeds of the sale of the land and all income from it are by this agreement appropriated to the payment of appellant's debt, yet the debt constitutes no lien upon the land itself, and vests in the appellant no interest, legal or equitable, in the defendant Rainey's one-third interest in said land.

In the court below counsel for the appellees relied upon two cases, *Vaniman vs. Gardner*, 99 Ill. App., 345; and *Cook vs. Black*, 54 Ia., 693.

The case of *Vaniman vs. Gardner* is not applicable to the case at bar. The agreement in that case provided

"That in case they shall sell the said tract of land, then "there shall be due and payable to said Moss Roberts out of the "money arising from such sale the sum of $500, with interest * * * * , and in case of the death of the said Anthony Rob- "erts leaving no will by virtue of which said Moss Roberts shall "become devisee and owner of said tract of land, then and in "that case there shall be paid to said Moss Roberts, out of the "estate of said Anthony Roberts, the said sum of $500."

The court say:

"We are unable to see in the written contract involved in "this case an intention on the part of Anthony Roberts to create "a lien or charge upon the land. It did not obligate him to sell "the land and clearly contemplated that he might or might not "sell it, as he saw fit. It only provided two events in which "there should be due his son the $500; one in case he should sell

"the land, and the other in case he should die leaving no will "under which his son should become the owner of the land."

The agreement in the case at bar recites that

"Said parties have joined in said purchase for the purpose "of platting, grading and otherwise improving said property, "and as so improved selling and disposing of same at a profit."

The agreement in the case at bar appropriates not only the proceeds of the sale, but all income derived from the property, to the payment of Smith's debt.

The case of *Cook vs. Black* holds that the mere expression of an intention to pay a certain creditor out of the proceeds of certain property does not give such creditor a lien upon the property.

We submit that, for the reasons given, the judgment in the case at bar is clearly erroneous and must be reversed.

RYAN, OGDEN & BOTTUM,
Attorneys for Appellant.

JAMES G. FLANDERS,
Of Counsel.

(20,439.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 144.

JESSE HOYT SMITH,
Appellant,

vs.

WILLIAM J. RAINEY, LILLIAN RAINEY, His Wife, FRANK LUKE, and JOHN LUKE.
Appellees.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT.

Since our principal brief in this action was printed, we have been furnished with a copy of the brief on behalf of the appellees in the case at bar. We have deemed it advisable to submit to the Court a short brief in reply thereto.

On page 2 of the appellees' brief the Court will observe that the appellees have stated that

"On June 11, 1902, the defendants, Frank and John Luke, "brought suit in Maricopa County against Rainey, and attached his "undivided one-third interest in this land, and in that action such "proceedings were had that on June 11, 1903, the said Frank Luke "and John Luke recovered judgment against Rainey for $2,500, "which judgment foreclosed the lien of the attachment on the land "above mentioned," referring to folio 21, transcript of record.

Reference to folio 21 of the transcript of record discloses that these facts are merely allegations in an answer which was filed by the

took the title free from any equitable lien that might have been created by the agreement under consideration. In the case at bar it is admitted by the demurrer that the interest of the appellees is subsequent and subject to that of the appellant.

On page 5 of the appellees' brief we find various authorities cited to the proposition that the fact that Smith advanced all of the purchase money does not entitle him to a lien upon the propery purchased. We have not contended in our principal brief, nor do we now contend, that a mere loan of money for the purpose of purchasing real estate entitles the person making the loan to a lien upon the real estate purchased. What we have contended, and do contend, is that the agreement set forth in the complaint in the case at bar clearly evinces an intention to appropriate the property in question to the payment of the indebtedness from Rainey to the appellant.

On pages 11 and 12 of the appellees' brief, counsel for the appellees argues that the agreement in question negatives any idea that it was the intention of the agreement to give to the appellant a lien upon the premises in question for the payment of the debt due him from Rainey. We understand counsel to argue that this is true, because by paragraph 4 of the contract it is provided that these advances are to be considered and treated as loans, and because paragraph 5 provides that, if at the end of five years from the date of the contract, the loan shall not have been paid, then Rainey agrees to pay to appellant one-third of said advances on demand. We have always supposed, and, with all deference to the argument of counsel, are still under the impression that one of the necessary incidents of a mortgage, whether a legal or an equitable one, is a debt to be secured by the lien of that mortgage. We have never heard it argued that, because there was a personal debt or obligation, there could be no mortgage to secure it; yet this seems to be the argument of counsel for appellees.

On page 14 of appellees' brief, counsel for appellees cites paragraph 749, Revised Statutes, 1901, which provides:

"749. Sec. 29. All bargain, sales and other conveyances what-"ever, of any lands, tenements and hereditaments, whether they may

"be made for passing any estate of freehold or inheritance or for a "term of years; and deeds of settlement upon marriage, whether "land, money or other personal thing, and all deeds of trust and "mortgages whatsoever, which shall hereafter be made and executed, "shall be void as to all creditors and subsequent purchasers for valu- "able consideration without notice, unless they shall be acknowledged "and filed with the recorder, to be recorded, as required by law, or "where record is not required deposited and filed with the recorder; "but the same, as between the parties and their heirs, and as to all "subsequent purchasers, with notice thereof, or without valuable con- "sideration, shall nevertheless be valid and binding."

On page 15 of appellees' brief counsel cites the case of *Grace vs. Wade*, 45 Tex., 522, in which it was held that an attaching or judgment creditor was by the statutes of Texas (from which Par. 749, R. S. 1901, above cited, was copied) unaffected by any unrecorded liens. This may be the law of Arizona. When that question arises in the case at bar, if it ever does arise, we shall be prepared to maintain the appellant's position. It does not, however, arise on this appeal. So far as this appeal is concerned, it does not appear that the appellees are attaching or judgment creditors, nor does it appear what interest they have or claim upon the premises in question. It does appear that whatever their interest may be, it is subsequent and subject to the lien of the appellant.

We submit that, for the foregoing reasons and those contained in our principal brief, the judgment in the case at bar must be reversed.

LEWIS M. OGDEN,
Counsel for Appellant.

Office Supreme Court, U. S.
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CLERK.

No. 144.

IN THE

Supreme Court

OF THE

United States.

JESSE HOYT SMITH,
Plaintiff and Appellant,

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WILLIAM J. RAINEY AND LILLIAN RAINEY, HIS WIFE, FRANK LUKE AND JOHN LUKE,
Defendants and Appellees.

Brief on behalf of Appellees, Frank Luke and John Luke.

Filed this.....day of.....1907.

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Clerk of the Supreme Court of the United States.

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Thos. H. Mc Gillen Co., Printers, Phoenix, Arizona.

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Brief on behalf of Appellees, Frank Luke and John Luke.

STATEMENT BY APPELLEES.

The facts in this case are undisputed, and are briefly these:

On March 20th, 1897, the plaintiff, Jesse Hoyt Smith, and the defendant, Wm. J. Rainey, purchased a tract of land in Maricopa County, jointly, the deed thereof conveying an undivided two-thirds thereof to the plaintiff Smith, and an undivided one-third thereof to the defend-

ant Rainey. This deed was recorded in Maricopa County the same date. (Folio 10, Tr. of R.)

On June 11th, 1902, the defendants, Frank and John Luke, brought suit in Maricopa County against Rainey, and attached his undivided one-third interest in this land, and in that action such proceedings were had that on June 11th, 1903, the said Frank Luke and John Luke recovered judgment against Rainey for $2,500, which judgment foreclosed the lien of the attachment on the land above mentioned. (Folio 21, Tr. of R.) On September ( ), 1903, the undivided one-third interest of Rainey in this tract of land was sold by the sheriff under an order of sale issued upon said judgment, and the judgment creditors Frank and John Luke became the purchasers at the sale for the debt, interest and costs, and their judgment was thereby satisfied in full.

To defeat the title acquired by this sheriff's sale and, consequently, the collection of the money due on the judgment, the plaintiff Smith brings this action, setting up a written contract between himself and Rainey alleged to have been executed at the time of the purchase by Smith & Rainey of the land in question. This alleged contract was never either acknowledged or recorded, yet the Court is asked to declare that it constitutes an equitable mortgage on the premises prior in right to the lien of the Luke attachment and judgment.

The complaint, though purely equitable relief is asked, is not verifed.

To this complaint the appellees, Frank and John Luke, demurred, and answered setting up the facts above set forth.

BRIEF.

In order that a contract may be construed to create an equitable lien upon real or personal property, it must reveal the intention to create a lien upon the *property itself*, as distinguished from an agreement to apply the proceeds of a sale of it, or its income, to the payment of a debt.

Jones on Liens, Vol. I, Sec. 32.
Vaniman vs. Gardiner, 99 Ill. App., 345.
Cook vs. Black, 54 Ia., 693 (7 N. W., 121.)

The fact that the appellant Smith paid more than his proportion or all of the purchase price of the land gives him no lien on the one-third interest conveyed to Rainey.

Brown vs. Budd, 2 Ind., 442.

The appellees' demurrer does not admit all the allegations of the complaint, but only admits *facts*, and of the facts alleged only those which are material and well pleaded, and it does not admit the pleader's conclusions of law from the facts pleaded.

Branham vs. M. & C. C., of San Jose, 24 Cal., 585.

ARGUMENT.

This is a suit in equity to declare and foreclose an alleged equitable lien on r[illegible] estate, alleged to be created by a writte[illegible] contract, a copy of which is attached to the complaint.

The Court will note that in this case the pleader relies entirely upon the written contract to establish the lien claimed. The complaint does not by any averment whatever aid the contract in this respect. There is no allegation of the intention or purpose of the parties to the contract, except that which is expressed therein. There is no suggestion that it was the purpose or intention of the parties to that contract, by that contract, to give to Smith a lien on Rainey's one-third of the land for one-third of the money advanced by Smith for its purchase and improvement, but it seems to be assumed that because Smith furnished the money to buy the land he must have a lien on the land for its repayment.

The legal effect of the contract not being aided by any averment of intention, we must look to the terms of the contract to see if by its *terms* a lien on the land is created or attempted to be created, for courts of equity can only declare liens where it is the intention of the parties to create them, and then only upon the property which the parties have intended to make subject to it.

Had the pleader alleged any intention on the part of the parties to the contract to create

a lien on the property itself, it is possible that evidence might have been admissible outside the contract to prove such intention, but having alleged no such intention no evidence to prove intention could have been admissible, and we can look only to the contract for such intention.

The fact that Smith advanced all the money for the purchase of the property gives him no lien

Jones on Liens, Secs. 70 and 75.
Brown vs. Budd, 2 Ind., 442.
Pontup vs. Barrett, 46 Ga., 407.
Weathersby vs. Sleeper, 42 Miss., 732.
Garland vs. Hull, 51 Am. Dec., 140.
Jones vs. Kennedy, 35 So., 465.

The last case cited clearly illustrates what has already been said regarding the necessity of the pleader alleging the intention of the parties to create a lien on the property where the contract does not specifically so state.

In that case the defendants gave plaintiff a promissory note for $600, which note stated that it was given for the purchasing of certain land, describing it. The land was not purchased from the payee of the note, but the money was borrowed and note given for money with which to purchase the land.

The complaint, in addition to setting up the execution and delivery of the note and its terms, and for what purpose it was given,

alleged that "in the giving of the note the defendant agreed that said T. C. McElvy have a lien on the described land to secure the payment of the $600 and interest, and the defendants *intended and agreed* by executing said note to create an equitable or other lien in favor of T. C. McElvy on said described lands to secure to him the payment of the $600 loaned to Sarah A. Jones."

Here the complaint was saved from demurrer by the averment of the purpose and intent with which the note was given, and there was nothing in the note (as there is in this contract) to contradict such purpose and intent.

The Court held in that case that the statements in the note created no lien or trust, and the plaintiff not proving such intention outside of the contract there was no lien.

The case of Brown vs. Budd above cited is directly in point. In this case Budd and one Collins had purchased some real estate and Budd had paid more than his proportion of the purchase price and by virtue of such payment claimed an equitable lien upon the premises. The Court in passing upon this point in the case says: "There was evidence that Budd, the plaintiff, had paid a larger amount toward the purchase of the property than had Collins, his co-purchaser, and the question is, had he a lien on the property for the excess thus paid by him over and above the amount paid by

Collins. The simple fact of his paying such excess gave him no lien."

2 Spence Eq. Jur., 804; Lug. V. & P., 902
Brown vs. Budd, 2 Ind., 442.

"A mere loan of money to be used in the purchase of land does not create a lien upon the land for its payment."

Jones on Liens, Sec. 75.

It will be noted that the contract expressly states that the advances made by Smith for the purchase of this land "shall be considered and treated as a loan or loans by him," (Folio 12 Tr. of Record) and if these loans are not repaid from the sales of the property within five years from the date of the contract then Rainey agrees to pay Smith one-third of said loans *on demand*. (Folio 12 Tr. of R.)

These provisions of the contract distinctly set forth the advances of Smith to have been a loan to Rainey to the extent of one-third thereof, and that such loan was made to Rainey upon his personal credit, because in case the advances are not repaid out of the proceeds of sales of the property within five years, the personal promise of Rainey to pay one-third of such advances *on demand*, is all the security taken by Smith or contemplated by the contract.

This clearly brings this case within the principle that, "a mere loan of money to be

used in the purchase of land does not create a lien upon the land for its payment."

It will still further be noted that the contract provides that Rainey will repay the loan if not otherwise paid in five years, "*upon demand.*"

This contract is dated March 20th, 1897, (Folio 10, Tr. of R.) and this action was commenced by the filing of the original complaint July 18th, 1903, (Folio 5, Tr. of R.) more than six years after the making of the contract.

Presumptively therefore a demand upon Rainey for payment according to the terms of the contract would have resulted in payment of his indebtedness, but until such demand no obligation rested upon him to pay. There is no allegation in the complaint of any demand upon Rainey for payment ever having been made. The complaint makes no such demand and no judgment is asked against Rainey for the money he has agreed to pay on demand. It must be assumed, therefore, that all Smith has to do to recover the money he loaned to Rainey is to make his demand upon Rainey for it according to the terms of the contract.

But it is claimed that because in this written contract it was agreed that one-third of Smith's advances for the purchase and improvement of this property should "be paid to him as rapidly as possibly from the receipts from the sale or sales or other income of said

property" thereby a lien was created on the property itself, or rather upon Rainey's one-third for one-third of such advances.

The answer to this is two-fold:

First.—In order to create a lien on the property the intention must be to create a lien on the property itself as distinguished from an agreement to apply the proceeds of a sale of it to the payment of a debt.

1 Jones on Liens, Sec. 32.
Vaniman vs. Gardiner, 99 Ill. App., 345.
Cook vs. Black, 54 Ia. 693 (7 N. W., 121).

"The intention must be to create a lien upon the *property*, as distinguished from an agreement to apply the proceeds of a sale of it to the payment of a debt."

Jones on Liens, Sec. 32.

The case of Vaniman vs. Gardiner is directly in point and very instructive.

In that case the defendant, by written contract, which is set forth in full in the report, agreed to build a house on the plaintiff's land, and it was agreed that upon a sale of the land the defendant should be paid $500 for building the house, and in case the plaintiff should die without making the defendant his devisee of said land, defendant should be paid $500 out of his estate.

After the house was built plaintiff mortgaged the land, and in a suit to foreclose that

mortgage the defendant set up by cross bill, the above contract as creating a prior equitable lien on the land. The Court sustained a demurrer to the cross bill on the ground that the contract provided only for payment of the $500 out of the proceeds of the sale of the premises and did not purport to create a lien on the property itself. In deciding the case the Court quotes with approval the quotation above from Jones on Liens.

Vaniman vs. Gardiner, 99 Ill. App., 345.

The cases cited by the appellant to support the claim that an equitable lien is created by an agreement to pay out of the proceeds of a sale can all be grouped into two classes.

First.—Where the property sought to be held by an equitable lien is a fund arising from the sale or operation of the property and still in the hands of the debtor, as in the case of Ketchum vs. St. Louis, 103 U. S., 306.

Second.—Where the agreement in terms pledges both the property and its proceeds to the payment of the debt, as in the case of Chase vs. Peck, 21 N. Y., 581.

These cases, we think, have no application to the case at bar. And, moreover, in all of the cases cited by appellant, so far as we have been able to examine them, the pleader has specifically alleged in his complaint that it was the intention and purpose of the parties by the

contract to give to the plaintiff a lien upon the premises for the payment of the debt.

We believe that no case can be found holding that a contract to pay out of the proceeds of a sale of the premises constitutes of itself an equitable lien on the premises without any averment that such was the purpose and intention of the parties in executing the contract.

Second.—That the contract itself not only fails to declare such intention, but negatives any idea of such intention.

Par. 4 of the contract (Folio 22 of A) states that these advances are to be considered and treated as loans. Par. 5 of contract (folio 23 A) provides that, if at the end of five years from the date of the contract the loan shall not have been paid, then Rainey agrees to pay Smith one-third of said advances on demand. The second clause of paragraph of contract (Folio 29 A) declares that the purpose of the contract is to state explicitly the terms upon which Smith and Rainey have joined in the purchase of the land.

In all of this there is not one word of suggestion that Smith claimed or was to have a lien on the land for his advances. On the contrary, by paragraph 5 of the contract, Smith takes Rainey's personal obligation for the payment of the money if it shall not be paid out of the sales or income of the property before the expiration of five years, and this without any suggestion that if the money is not repaid

by that time that Rainey shall secure Smith by a mortgage on the land. At the time this action was commenced those five years had expired, and Smith by this clause in the contract had Rainey's personal promise to repay the money. This is what the contract explicitly states, and the last clause of the contract states that it is made for the purpose of setting forth the agreement explicitly; therefore what is not stated cannot be inferred.

The contract therefore stating explicitly the agreement and mentioning no intention to create a lien upon the land, the contract not being acknowledged, and the pleader not having alleged that the parties by the contract intended to create a lien on the property, the Court could not upon proof only of the facts alleged in the complaint declare that it was the intention of the parties to create a lien on the property.

But it is argued that the demurrer admits all the allegations of the complaint, and that one of those allegations is that the lien of the appellees, Frank and John Luke, is subject and subordinate to the lien of plaintiff, and that this allegation is admitted by the demurrer.

The answer to this also is twofold:

First.—The plaintiff must, by the allegations of his complaint, show *that he has a lien* before the allegation that his lien is superior to that of appellees can have any application

whatever. If his complaint does not show that he has any lien then he has no standing in this case and his complaint would not support a judgment in his favor. The demurrer raises the question for the Court to determine whether the facts alleged in the complaint gives the plaintiff any lien whatever, and this must be determined before the question of priority can be raised.

Second.—A demurrer only admits facts, not conclusions, and only issuable facts, well pleaded.

This is elementary, and is well illustrated in 24 Cal., 585.

The question of the priority of rights is a conclusion of law which it is the province of the Court to determine from all the ultimate and issuable fact pleaded and proven in the case. It is the sole object of the suit; it is not traversable or issuable. It is like an allegation of power or authority; it is a conclusion which counsel draws, and it is to determine the soundness of this conclusion that the action is brought, and it is to the soundness of this conclusion from the facts alleged that the demurrer is directed, and to which it applies the test.

We would refrain from discussing the position of the appellees, Frank and John Luke, as attachment and judgment creditors of Rainey on the determination of this demurrer, were it not for the fact that the appellant constantly

refers to it and discusses it in his brief in the Supreme Court of Arizona.

Their position is this:

The record title to an undivided one-third of the premises in controversy remained in Rainey from March 20th, 1897. Presumably upon the faith and credit of the financial standing of Rainey by virtue of this title he became indebted to the appellees, and on June 11th, 1892, more than five years after he acquired this record title, appellees attached the property and thereafter obtained judgment against Rainey for $2,500, with a foreclosure of their attachment lien. All this without any suggestion or intimation to them from Rainey, Smith or any one else, or any means of knowing that Smith claimed any interest in Rainey's title. Smith kept his contract secret during all the time from the attachment until the judgment (just one year), when he might have intervened and set up his rights if he had any.

Now what is the position of the Lukes under our statutes.

Par. 749 Rev. Stat. 1901, provides as follows:

"749. (Sec. 29.) All bargains, sales and other conveyances whatever, of any lands, tenements and hereditaments, whether they may be made for passing any estate of freehold or inheritance or for a term of years; and deeds of settlement upon marriage, whether land,

money or other personal thing, and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged and filed with the recorder, to be recorded, as required by law, or where record is not required deposited and filed with the recorder; but the same, as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof, or without valuable consideration, shall nevertheless be valid and binding."

This section is copied verbatim from R. S. 1887, in which it is paragraph 2601, and it was copied and adopted with that revision from the Civil Code of Texas, in which it is paragraph 4640 of Sayle's Statutes.

In the case of Grace vs. Wade, 45 Tex., 522, the Supreme Court of Texas settle beyond controversy the rights of an attaching creditor or judgment creditor, and demonstrate that they are unaffected by any unrecorded liens whatever. That the question of notice is not by statute made to apply to them, but only to subsequent purchasers. That the statute says and means that such unrecorded liens are void as *to all creditors;* and that the judgment creditor or any other purchaser at execution sale gets good title as against all secret or unrecorded liens.

This case is so well considered and so exhaustively discussed that it leaves nothing more to be said on the subject.

This case was decided in 1876 and long before the adoption of the section of our Statutes above quoted, and we think is controlling in this Territory under the familar rule, that a State or Territory adopting a Statute of another State or Territory which has been construed by the Supreme Court of that State, adopts the construction already placed upon the Statute by the Courts of the State from which it is adopted.

Respectfully submitted,

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